THE SHEA ERA
CASE LAW REVIEW

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Montana Governor's Conference on Workers' Compensation
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ATTORNEYS' FEES

***Arneson v. Travelers Prop. Cas.*, 2006 MTWCC 7** (Order Granting Partial Summary Judgment).

Related Topics: Penalties.

Summary: Respondent moves for partial summary judgment with respect to Petitioner's claim for additional travel expenses and attorneys' fees.

Held: Summary judgment granted. Mileage reimbursement is intended to cover the type of expenses that Petitioner is attempting to claim separately. With respect to attorneys' fees and costs, Respondent paid the medical expenses prior to adjudication and therefore is not liable for attorneys' fees pursuant to RCM 92-616, -618 (1975).

***Vanbouchaute v. Montana State Fund*, 2007 MTWCC 37** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Penalties.

Summary: Petitioner petitioned the WCC for a determination as to whether he was entitled to receive a lumbar fusion as recommended by his physician. Petitioner also sought attorneys' fees and a penalty.

Held: Respondent authorized surgery shortly after the conclusion of the hearing. Respondent's conduct in denying the surgery recommended by his treating physician based initially on a file review by the managed care organization's medical advisor and then the second opinion of an independent medical examiner was unreasonable. However, since Respondent authorized the surgery before the claim was adjudged compensable by the WCC, Petitioner is not entitled to recover his attorneys' fees or costs. Petitioner is entitled to a penalty.

***Pinnow v. Halverson, Sheehy & Plath, P.C.*, 2008 MTWCC 53** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner entered into a settlement agreement which settled two workers' compensation claims with Respondent acting as her attorney. Although Petitioner ultimately accepted the settlement amount, she contested Respondent's right to an attorney fee, arguing that Respondent did not adequately represent her interests.

Held: The evidence overwhelmingly demonstrates that Petitioner was well-represented by Respondent. Respondent is entitled to its attorney fee and costs as provided for in the Attorney Retainer Agreement signed by Petitioner and Respondent.

***Briese v. MACO Workers' Comp. Trust and Joanne Briese,* 2008 MTWCC 50** (Order Denying Richard H. Renn's Motion to Award Attorney Fees) (*Appealed to Montana Supreme Court - December 22, 2008; Affirmed – August 4, 2009).*

Summary: Petitioner's former attorney moves the Court for an order awarding attorney fees on death benefits payable to Petitioner's children during the period of time he represented Petitioner in a claim for death benefits.

Held: Petitioner's former attorney is not entitled to a fee on benefits awarded to the children because he did not represent the children and the benefits payable to the children under the Stipulation for Entry of Judgment were not due to the attorney's efforts.

BELTON CASES

***Harrison v. Liberty Northwest Ins. Corp. and Stillwater Mining Company,* 2006 MTWCC 22** (Findings of Fact, Conclusions of Law, and Judgment) *(Appealed to Montana Supreme Court - May 26, 2006; Affirmed - April 1, 2008*).

Summary: Petitioner petitioned the Court to determine whether Stillwater Mining Company or Liberty Northwest Insurance Corporation, insurer for Derek Brown Construction Company, was responsible for payment of his medical costs and disability benefits.

Held: Stillwater Mining Company (Stillwater) is responsible for the payment of Petitioner's medical costs and disability benefits. Dr. Varnavas, one of Petitioner's treating physicians, opined that Petitioner's back injury sustained while on the job at Derek Brown Construction Company (Derek Brown) occurred as a direct result of a previous occupational disease Petitioner suffered while working for Stillwater. Dr. Varnavas's opinion was not disputed by Petitioner's other treating physician, Dr. Quenemoen, who was unable to opine whether Petitioner's injury sustained while on the job at Derek Brown was a result of his occupational disease suffered while working for Stillwater. Liberty Northwest Insurance Corporation (Liberty) paid Petitioner temporary total disability benefits and also paid for Petitioner's back surgery. Stillwater must indemnify Liberty for these medical and disability benefit payments. Stillwater should continue to pay Petitioner's disability and medical benefits. Petitioner is also entitled to receive his costs from Stillwater.

***Liberty Northwest Insurance Corporation v. Valor Ins. Co.,* 2008 MTWCC 7** (Findings of Fact, Conclusions of Law and Judgment).

Summary: The claimant suffered knee and neck injuries as a result of an industrial accident on March 5, 2002. His neck injuries were diagnosed as a strain with an underlying degenerative condition. A cervical MRI taken March 23, 2005, revealed a herniated disk. In the interim, the claimant's employer switched workers' compensation insurers. Respondent, who was the insurer at the time of the claimant's industrial accident, denied liability on the grounds that the herniated disk was the result of an occupational disease which developed after July 1, 2002, when it ceased to be the insurer of claimant's

employer. Petitioner, who became the employer's workers' compensation insurer on July 1, 2002, denied liability on the grounds that the herniated disk was caused by the March 5, 2002, industrial accident. Petitioner now seeks reimbursement from Respondent of certain medical and wage-loss benefits it has paid the claimant under a reservation of rights.

Held: The claimant did not reach maximum medical improvement (MMI) for his cervical condition until after he was declared to be at MMI following his neck surgery. Accordingly, Respondent is liable for the claimant's neck condition and Petitioner is entitled to indemnification for the benefits it paid pursuant to *Belton v. Carlson Transport*.

BENEFITS

***Hedrick v. MACO Workers' Comp. Trust,* 2006 MTWCC 3** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – May 3, 2006; Appeal Dismissed by Stipulation – October 12, 2006*).

Summary: Petitioner petitioned to receive treatment for her carpal tunnel syndrome by a Washington state physician, and for disability benefits for periods of time she claims she was disabled.

Held: Petition to receive treatment for carpal tunnel syndrome is granted. Petition to receive disability benefits for periods of time Petitioner claims she was disabled is denied. Subject to Petitioner's treating physician's opinion regarding Petitioner's employability during her recovery from surgery, Petitioner may be entitled to disability benefits for the period of her recovery from surgery.

***Hiett v. Montana Schools Group Ins. Auth./Montana State Fund* and *Liberty Northwest Ins. Corp.*, Intervenors, 2006 MTWCC 33** (Order Determining Threshold Issues in Scope of Decision).

Summary: Following briefing by the parties, the Court determined whether the Montana Supreme Court's ruling in this case abrogates the exclusion of palliative and maintenance care set forth in § 39-71-704(1)(f), MCA; and whether the criteria for furnishing of secondary medical services set forth in § 39-71-704(1)(b), MCA, may still apply under any circumstances or whether this section was wholly abrogated by *Hiett*.

Held: The *Hiett* decision has not abrogated the exclusion of palliative and maintenance care, and the secondary medical benefits provision has not been wholly abrogated by *Hiett* and may still apply to particular claims.

***Woodards v. Montana Ins. Guar. Assoc.*, 2007 MTWCC 55** (Order Granting Respondent's Motion for Summary Judgment, Denying Petitioner's Motion for Summary Judgment, and Granting Respondent's Cross-Motion for Summary Judgment) (*Appealed to Montana Supreme Court – March 6, 2008; Dismissed by Stipulation – July 23, 2008*).

Summary: Respondent moved for summary judgment, arguing that because Petitioner is considered retired, she is not entitled to PTD benefits pursuant to § 39-71-710, MCA. Petitioner moved for summary judgment, arguing that Respondent unlawfully retroactively converted her TTD benefits to PPD benefits without notice. Respondent cross-motioned for summary judgment on the notice issue.

Held: Petitioner is not entitled to PTD benefits pursuant to § 39-71-710, MCA, and therefore Respondent's motion for summary judgment on this issue is granted. Because Petitioner never met the legal definition of PPD, she was never entitled to PPD benefits. Despite how either party would characterize the payment of these benefits, legally, there could not have been a retroactive "conversion" of benefits to which Petitioner was entitled. The benefits Petitioner received after reaching maximum medical improvement amounted to an overpayment of TTD benefits. Petitioner's motion for summary judgment on the retroactive conversion issue is therefore moot and Respondent is entitled to summary judgment in its favor on this issue.

***Aldrich v. Montana State Fund,* 2007 MTWCC 57** (Decision and Judgment) (*Appealed to the Montana Supreme Court - January 15, 2008; Affirmed – February 18, 2009*).

Summary: Petitioner petitioned this Court for an award of temporary total disability (TTD) benefits during the period of Petitioner's medical instability resulting from an occupational disease, notwithstanding the age or Social Security retirement status of Petitioner. Respondent argues that Petitioner is not entitled to TTD benefits because he has failed to prove an actual wage loss.

Held: Petitioner is not entitled to an award of TTD benefits. Pursuant to § 39-71-701, MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing. In this case, at the time Petitioner contends he was no longer at maximum healing, he had not worked for approximately eleven years and had been drawing Social Security retirement benefits for approximately two years. None of the facts presented to this Court establish that Petitioner suffered any wage loss as a result of his injury when he was no longer at maximum healing. Petitioner, therefore, has failed to meet his burden of proof that he was entitled to receive TTD benefits.

***Fabbi v. Valley Forge Ins. Co.,* 2008 MTWCC 16** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to the Montana Supreme Court - May 14, 2008; Appeal Dismissed Pursuant to Joint Motion – November 26, 2008*).

Summary: Petitioner petitioned the Court for temporary total and temporary partial disability benefits for the time periods between January 24, 2001, and November 14, 2001, and from May 2, 2002, through September 29, 2002. Petitioner also requested attorney fees, costs, and a penalty. Respondent argued that Petitioner was not entitled to the requested benefits because her physician released her to her time-of-injury job and Petitioner voluntarily terminated her employment with Respondent's insured.

Held: After being released to return to work without restrictions, Petitioner advised her employer that she was not available for further work until she notified it otherwise. Petitioner never notified her employer that she was available for work after that time. Because Petitioner voluntarily terminated her employment with her time-of-injury employer for the balance of time, she is not entitled to the requested benefits.

***Vanvallis v. Liberty Northwest Ins. Corp.,* 2008 MTWCC 25** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner was injured in the course and scope of her employment as a full-time employee. She returned to her time-of-injury job on a part-time basis because of her physician-ordered work restrictions, but was unable to adequately perform the job duties of her time-of-injury job. Petitioner's employer placed her in an alternative part-time position which allowed her to work within her 25-hours-per-week restriction. Petitioner petitioned this Court for a determination of whether the 25-hours-per-week job constitutes regular employment within the meaning of § 39-71-116(24), MCA.

Held: The Court concludes that Petitioner's job, which employed her 25 hours per week, every week, is substantial and significant, and constitutes "regular employment" within the meaning of § 39-71-116(24), MCA.

***Lafountain v. Montana State Fund,* 2008 MTWCC 46** (Judgment).

Summary: Petitioner suffered an industrial injury on September 17, 2002. Respondent accepted liability and paid benefits. Petitioner contends that he is entitled to payment of lost wages at the rate of $1,610 per week. Petitioner further contends that Respondent should authorize him to travel to Germany for a surgical procedure which is not available in the United States. Respondent contends that Petitioner has been paid indemnity benefits at the correct rate, and that he is not entitled to travel for surgery.

Held: Petitioner is not entitled to the amount of wage-loss benefits he seeks as a matter of law. Although Petitioner satisfied the Court that he is in pain from his industrial injury and that he is motivated to improve his condition and return to work, Petitioner did not meet his burden of proof regarding his entitlement to the specific treatment he desires.

***Quick v. Montana State Fund,* 2008 MTWCC 27** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to Montana Supreme Court - July 1, 2008; Cross-Appeal Filed - July 15, 2008*; *Affirmed - May 13, 2009*).

Related Topics: Penalties.

Summary: Petitioner petitioned the Court for retroactive and future domiciliary care benefits, a higher rate of pay for domiciliary care provided by Petitioner's wife, Dolly, a 20% penalty, attorney fees, and costs. Petitioner argued that Respondent was placed on notice that Petitioner required domiciliary care at the time of his 1984 accident, and that Dolly has

been providing the care since then. Respondent argued that it did not have notice that Petitioner needed domiciliary care until February 1, 2007, the first day a medical opinion was received by it stating that domiciliary care was warranted. Prior to trial, Respondent conceded that Petitioner required 24-hour domiciliary care. Respondent began paying a rate of $7.50 per hour to Dolly, effective February 1, 2007.

Held: Petitioner is not entitled to retroactive domiciliary care prior to February 1, 2007, because Respondent was not put on notice that domiciliary care was warranted until this date. Significantly, Petitioner's attorney in 2005 stated in a letter to Respondent that a claim for domiciliary care benefits had never been made. Respondent's rate of $7.50 per hour is unreasonable. The evidence establishes that similar rates were paid for domiciliary care not provided by a person with RN skills in the late 1980s, and in the present case, the evidence establishes that Petitioner requires his care to be provided by a person with RN skills. The Court finds that, based upon the testimony of a qualified professional, $20.00 per hour is a reasonable rate of pay for Dolly because she is an RN. Further, the Court finds that Petitioner is entitled to a 20% penalty because Respondent's rate is an unreasonable rate.

BURDEN OF PROOF

***Hinman v. Montana State Fund,* 2007 MTWCC 2** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - January 16, 2007*; *Affirmed October 30, 2007*).

Summary: Petitioner petitioned the Court for workers' compensation benefits because of chemical exposures occurring during his employment with Specialized Automotive.

Held: Petitioner is not entitled to any workers' compensation benefits. Petitioner has not met his burden of proving his chronic obstructive pulmonary disease was caused by the chemical exposures occurring during his employment with Specialized Automotive.

***Johnson v. MHA Workers' Comp. Trust,* 2007 MTWCC 17** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to Montana Supreme Court - June 21, 2007; Appeal Dismissed on Appellant's Motion – October 19, 2007*).

Summary: Petitioner petitioned the Court relative to two claims for benefits. The first relates to an injury that allegedly occurred on February 18, 2005. The second relates to an injury that allegedly occurred on October 4, 2005.

Held: Regarding her February 18, 2005, claim, Petitioner has not met her burden of proof that she suffered a compensable injury. The Court concludes Petitioner suffered a compensable injury to her right shoulder and arm on October 4, 2005.

***Foster v. Montana Schools Group Ins. Auth.,* 2007 MTWCC 18** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Causation.

Summary: Petitioner sustained a left knee injury on September 6, 2005, while employed by Respondent's insured, Evergreen School District. On October 27, 2005, Petitioner underwent a left knee arthroscopy with a partial medial meniscectomy. On November 22, 2005, Petitioner was released to full duty by her treating physician. On December 20, 2005, Petitioner returned to her treating physician noting severe pain and catching in her left knee. Ultimately, an MRI conducted on May 19, 2006, showed evidence of an avascular necrosis of the subchondral area of the lateral femoral condyle. Petitioner contends that the avascular necrosis is causally related to either her injury of September 6, 2005, or the medial meniscectomy of October 27, 2005. Alternatively, Petitioner contends that an additional arthroscopy should be authorized to determine whether she has sustained a repeat meniscal tear. Respondent has denied liability, contending that Petitioner has failed to establish a causal relationship between the avascular necrosis and her industrial injury. Respondent also contends that Petitioner has failed to establish on a more-probable-than-not basis that she has sustained a repeat meniscal tear.

Held: Petitioner has failed to establish on a more-probable-than-not basis that the avascular necrosis is causally related to either her injury of September 6, 2005, or her arthroscopy of October 27, 2005. With respect to the possibility of a repeat meniscal tear, Petitioner has likewise failed to establish on a more-probable-than-not basis that such an injury exists. The MRI conducted on May 19, 2006, showed no evidence of a tear, and her treating physician's testimony that there may be a 5-10% chance that the MRI may have missed it does not satisfy Petitioner's burden of proof.

***Somerville v. Montana Assoc. of Counties Workers' Comp. Trust,* 2007 MTWCC 36** (Order Denying Petitioner's Motion for Reconsideration).

Summary: Petitioner moves for reconsideration of this Court's conclusion that Petitioner failed to meet his burden of proof that he was entitled to benefits. Petitioner urges the Court to reweigh the evidence and find in his favor.

Held: Petitioner's motion is denied. Petitioner directs the Court's attention to the same evidence which the Court already considered and the sum of his argument is that the Court should assign more weight to the discrepancies in the testimony of Respondent's witnesses, and less weight to the discrepancies in Petitioner's testimony. Having already considered the evidence which Petitioner emphasizes in his brief, the Court concluded Petitioner failed to meet his burden of proof. Upon reconsideration, that determination stands.

***Healy v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 43** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Physicians.

Summary: Petitioner injured his low back in a work-related incident in 2005. He had previously settled a workers' compensation claim for a low-back injury in 1998. While Petitioner complained of severe pain in his low back and leg and an MRI revealed a herniated disk, the PA-C who was treating him and the PA-C's supervising physician concluded that no objective medical findings supported Petitioner's subjective complaints of pain. Petitioner was released to work without restriction, but he did not return to work and sought medical treatment elsewhere, eventually having back surgery performed. The physician from whom Petitioner last sought treatment opined that Petitioner's back condition was permanently aggravated by his 2005 industrial injury. Respondent denies liability for benefits from the date Petitioner was released to work without restriction.

Held: Petitioner has demonstrated by a preponderance of the evidence that his back condition was permanently aggravated as a result of his June 9, 2005, industrial injury. Respondent is therefore liable for payment of workers' compensation benefits.

***Heffner v. Montana State Fund,* 2007 MTWCC 40** (Order Denying Petitioner's Motion for Reconsideration).

Summary: Petitioner moves for reconsideration of this Court's decision that Petitioner failed to meet his burden of proof that he was entitled to benefits.

Held: Petitioner's motion is denied. Petitioner contends the Court failed to properly consider the 1979 workers' compensation statutes regarding his burden of proof. Specifically, Petitioner argues that he established it was medically possible that his injury was causally related to his industrial accident and this constitutes acceptable proof to meet his burden. However, Petitioner failed to meet his burden of proof that his injury was more probably than not caused by his industrial accident. Petitioner further argues the Court erred in excluding certain exhibits. Having revisited the exhibits in question and the rulings on these evidentiary matters, I see no reason to disturb my earlier rulings.

***Iron v. Montana State Fund,* 2008 MTWCC 15** (Findings of Fact, Conclusions of Law, and Judgment).

Related Topics: Credibility.

Summary: While performing his job duties, Petitioner was struck in the head by a metal lid which blew off a pressurized canister. Respondent accepted liability for Petitioner's facial injuries, but denied liability for an alleged injury to Petitioner's cervical spine. Petitioner sought treatment on his own and eventually had a cervical fusion performed. He now seeks medical and TTD benefits for his cervical condition and surgery, as well as costs, attorney fees, and a penalty.

Held: While Petitioner's underlying cervical condition progressed from the time of his industrial accident in 2004 until his cervical fusion in 2007, Petitioner's lack of credibility, lack of objective medical findings, and his treating physician's inability to attribute the cause of his cervical progression to the industrial accident, lead the Court to conclude that

Petitioner has not met his burden of proof. Respondent is therefore not liable.

***Russell v. Watkins & Shepard Trucking Co., Inc.*, 2008 MTWCC 36** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 18, 2008; Affirmed and Remand for Further Proceedings - June 24, 2009*).

Summary: Petitioner alleges that several of his health ailments were caused by chronic low-level carbon monoxide exposure which occurred while driving a semi-truck for Respondent. Respondent responds that Petitioner has failed to prove that his health problems were caused by chronic low-level carbon monoxide exposure and has failed to prove that he was exposed to an elevated level of carbon monoxide while driving for Respondent.

Held: Petitioner has met his burden of proof regarding his diagnosed cognitive dysfunction condition and his claim regarding his cognitive dysfunction is compensable. Regarding his other health ailments, Petitioner has not proven that it is more probable than not that they were caused by his carbon monoxide exposure and his claim for compensation regarding the remaining conditions is denied.

***Distad v. Montana State Fund*, 2009 MTWCC 16** (Order Denying Reconsideration) (*Appealed to the Montana Supreme Court - May 8, 2009; Dismissed with Prejudice – June 25, 2009*).

Summary: Petitioner moves for reconsideration of this Court's March 20, 2009, Findings of Fact, Conclusions of Law and Judgment in which this Court concluded that Petitioner is not entitled to reopen his settlement based upon a mutual mistake of fact and that Petitioner is not entitled to a penalty. Respondent Montana State Fund objects to Petitioner's motion.

Held: Although Petitioner sets forth three allegations which he argues entitle him to reconsideration, none of these allegations affect my conclusion that Petitioner did not meet his burden of proof regarding the cause of his back condition. Petitioner's motion for reconsideration is therefore denied.

CASUAL EMPLOYMENT

***Weidow v. Uninsured Employers' Fund*, 2009 MTWCC 4** (Order Denying in Part and Granting in Part, Petitioner's Motion for Partial Summary Judgment).

Summary: Petitioner moved this Court for partial summary judgment on the affirmative defenses raised by the Uninsured Employers' Fund and the Bradley Howard/Howard Family 1995 Trust that Petitioner was an independent contractor and was a casual employee. The parties have filed an Agreed Statement of Undisputed Facts.

Held: Petitioner's motion is denied in part and granted in part. There are material facts in dispute that preclude summary judgment on the casual employment issue. With regard to

the independent contractor defense, there are no material facts in dispute and Petitioner is entitled to summary judgment that he was not acting as an independent contractor at the time of his injury.

Raymond v. Uninsured Employers' Fund, 2009 MTWCC 31 (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Uninsured Employers' Fund.

Summary: Petitioner Matthew R. Raymond was injured on July 29, 2007, while working on the construction of a cabin. He worked on the project for eleven months. The property was owned by Joseph and Jean Seipel. Each week, Petitioner called on Joseph Seipel at the office of Market Research Group, a company which performs appraisals and conducts market research which Joseph operates as a sole proprietorship. Joseph paid Petitioner with checks bearing the Market Research Group name and address. Neither Joseph nor Market Research Group carried workers' compensation insurance at the time of Petitioner's injury. The Uninsured Employers' Fund denied liability for Petitioner's claim on the grounds that Petitioner was engaged in casual employment.

Held: Although Petitioner was paid out of the Market Research Group checking account, the evidence demonstrates that Joseph wrote many personal checks on that account. Joseph testified that he did not deduct personal expenses, including the money paid to Petitioner, as a business expense. While some evidence suggests that Joseph may have had a "profit motive" for the Lincoln property, ultimately, Petitioner offered insufficient proof to meet his burden. Therefore, I conclude Petitioner was engaged in "casual employment" as defined by § 39-71-116(6), MCA.

CAUSATION

***Zahn v. Town Pump, Inc., and Employers Ins. of Wausau Mut. Co.,* 2006 MTWCC 30** (Order Granting Petitioner's Motion for Summary Judgment) (*Order Vacated Pursuant to Settlement and Agreement of the Counsel - October 11, 2006*).

Related Topics: Wages.

Summary: This matter has been submitted to the Court for decision on a statement of stipulated facts. Petitioner sustained an injury to his low back while working for Town Pump, Inc. (Town Pump) in 1996. At the time of Petitioner's initial injury, Town Pump was self-insured and retained Putman and Associates, Inc. (Putman) to adjust the claim on its behalf. After undergoing surgery in 2003 to treat his injured low back, Petitioner's treating physician released him to return to work on a full-time basis. On December 4, 2003, Petitioner underwent a functional capacity evaluation (FCE) at Putman's request, during which Petitioner sustained an injury to his neck. This injury required surgery and has disabled Petitioner from work. At the time of the neck injury and the FCE, Petitioner was still an employee of Town Pump. However, at the time of the 2003 injury, Town Pump was enrolled under Plan No. 2 of the Montana Workers' Compensation Act and was insured

by Respondent Employers Insurance of Wausau Mutual Company. The parties agree that Petitioner's 2003 neck injury is compensable. However, Respondents contend that Petitioner's indemnity benefits should be paid at the 1996 rate since the FCE and resulting injury was a consequence of the 1996 injury. Petitioner contends he should be compensated at the 2003 rate since the neck injury is a new injury. Petitioner has moved for summary judgment on this issue.

Held: Summary judgment is granted. Petitioner sustained a new compensable injury resulting from an FCE that had been requested by Putman who was acting on behalf of his current employer, Town Pump.

Heckel v. Uninsured Employers' Fund, **2007 MTWCC 11** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Independent Contractors, Uninsured Employers' Fund.

Summary: An apartment manager who received a rent reduction in exchange for collecting rents and doing chores around the building where he resided argued that an infection he suffered in his arm was caused by a cut sustained during an altercation while he was attempting to eject a trespasser from the building, and therefore he is entitled to workers' compensation benefits. The building owner responded that the apartment manager was not an employee because he did not receive wages, that the apartment manager never notified the building owner of the injury, and that the medical evidence does not support the apartment manager's assertion that his arm infection was a result of the altercation.

Held: Although the Court concludes that the building owner knew of the altercation shortly after it occurred, and that the apartment manager was an employee because he received a rent reduction in exchange for his labors, ultimately, nothing in the medical records support a finding that the arm infection was a result of the altercation in the apartment building. Petitioner is therefore not entitled to workers' compensation benefits.

Hunter v. Hartford Ins. Co. of the Midwest, **2007 MTWCC 13** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner suffered an industrial injury in the course and scope of his employment on May 5, 1998. Petitioner contended that his right knee conditions were causally related to the May 5th accident. Respondent responded that Petitioner's right knee conditions were a natural progression of Petitioner's 1983 industrial injury.

Held: The preponderance of the medical evidence demonstrates that Petitioner's right knee conditions are causally related to the May 5, 1998, accident. Petitioner is entitled to receive medical benefits and all other benefits provided under the Workers' Compensation Act.

Oksendahl v. Liberty Northwest Ins. Corp., **2007 MTWCC 24** (Order Granting Petitioner's Motion for Summary Judgment) (*Appealed to Montana Supreme Court - July 9, 2007; Affirmed – April 22, 2008*).

Summary: Petitioner suffers from arthritis in his thumbs, which his treating physician and an IME doctor both opine would have developed irrespective of his employment. However, both doctors agree that Petitioner's employment probably aggravated or accelerated his thumb condition. Petitioner and Respondent both argue they are entitled to summary judgment as a matter of law as to whether Petitioner's thumb condition is a compensable occupational disease.

Held: Petitioner's motion for summary judgment is granted. Respondent's Motion for Summary Judgment is denied. Petitioner had been a carpenter all his life, the last five years of which were working for Respondent's insured. Both of the doctors who offered opinions stated that Petitioner's work aggravated this condition. The test for causation of an occupational disease is whether Petitioner's employment constituted a significant aggravation or significant contribution to his condition. Petitioner has established that the aggravation or contribution was significant.

***Heffner v. Montana State Fund,* 2007 MTWCC 29** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner petitioned the Court for payment of medical expenses associated with Petitioner's 2004 herniation of his L4-L5 or L5-S1 disk.

Held: Petitioner's L4-L5 or L5-S1 disk herniation is not causally related to his May 6, 1980, industrial injury. Accordingly, Respondent is not liable for Petitioner's medical expenses associated with the 2004 herniation.

***Kratovil v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 30** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court – September 25, 2007; Affirmed and Remanded for Further Proceedings – December 29, 2008*).

Related Topics: Last Injurious Exposure.

Summary: Petitioner worked as a plumber/pipefitter for nearly 30 years and suffered from problems with his hands and wrists which he attributes to an occupational disease. Petitioner also twisted his hands and wrists when a drill he was operating locked up, but he did not file an industrial accident claim on this incident. Petitioner also suffered injuries in a motorcycle accident. Respondent claims it is not liable for Petitioner's occupational disease claim because Petitioner admits he used his hands to break his fall during the motorcycle accident and Petitioner first experienced symptoms in his hands prior to working for Respondent's insured.

Held: Although Respondent argues that it should not be liable for Petitioner's occupational disease because Petitioner experienced soreness in his wrists prior to working as a plumber/pipefitter and subsequently may have injured his hands and wrists in a motorcycle accident, Respondent's insured was the employer of last injurious exposure and, even assuming Petitioner injured his hands and wrists in the motorcycle accident, his

employment with Respondent's insured nonetheless significantly aggravated or contributed to his occupational disease. Therefore, Respondent is liable for benefits.

***Lanes v. Montana State Fund,* 2007 MTWCC 39** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - November 7, 2007; Affirmed – September 3, 2008*).

Related Topics: Last Injurious Exposure.

Summary: Although Respondent accepted liability for Petitioner's left knee occupational disease, it has denied liability for Petitioner's subsequent occupational disease claim for his right knee. At the time of his left knee claim, Petitioner worked as an electrician for Respondent's insured. At the time of his right knee claim, Petitioner worked as a minister. Respondent alleges that Petitioner's church is the employer of last injurious exposure. Petitioner contends that his work for his church did not permanently aggravate his right knee condition.

Held: The aggravation to Petitioner's right knee caused by his work as a minister was merely temporary additional pain that would alleviate with rest and does not constitute a significant aggravation or contribution. However, Petitioner's work as an electrician significantly aggravated or contributed to his right knee condition. Therefore, Respondent, as the insurer of the employer where Petitioner suffered his last injurious exposure, is liable.

***Stewart v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 41** (Findings of Fact, Conclusions of Law and Judgment).

Summary: While working for Respondent's insured, Petitioner sustained an injury to her right knee. She then underwent two arthroscopic surgeries, after which she continues to experience ongoing pain which she attributes to nerve damage suffered during her surgeries. Petitioner petitioned the Court for an increase in her impairment rating because of her ongoing pain.

Held: Petitioner is not entitled to an increased impairment rating. Although Petitioner's treating physician testified that Petitioner's condition is related to her knee surgery, he further testified that he ultimately has no idea how Petitioner's condition could be related to her surgery. This is insufficient to establish causation. Because Petitioner has failed to prove a causal connection between her industrial injury or subsequent surgeries and her chronic pain condition, her petition for an increased impairment rating is denied.

***Uffalussy v. St. Patrick Hospital and Health Sciences Center,* 2007 MTWCC 45** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner suffered a work-related low-back injury on November 5, 1997. After the injury, Petitioner suffered balance difficulties that caused an unsteady gait. Additionally, Petitioner began to experience depressive episodes. In January 1998, Petitioner was

involved in a motor vehicle accident (MVA) and suffered a whiplash-type injury with a possible closed head trauma. Petitioner later developed cognitive impairment. Several doctors related the cognitive impairment to the head traumas Petitioner suffered as a result of several falls due to her balance difficulties, Petitioner's depression, chronic pain, fibromyalgia, and the possible head trauma sustained in the MVA. Petitioner argued that her inability to work because of her cognitive impairment was related back to her 1997 low back injury. Respondent argued that Petitioner's cognitive impairment was not caused by the industrial injury but was caused by the 1998 MVA.

Held: Petitioner's cognitive impairment is causally related to her industrial injury. Three physicians who treated Petitioner related her cognitive impairment to various factors including Petitioner's several head injuries suffered as a result of falls, depression, chronic pain, fibromyalgia, and the possible head injury suffered in the 1998 MVA. The physicians were unable to apportion the different factors and the evidence established that the falls subsequent to the MVA, the depression, and the chronic pain were all related to the industrial injury. To the extent that Respondent attributes Petitioner's cognitive impairment to the subsequent MVA, the evidence is not persuasive that Petitioner even sustained a head injury of any consequence as a result of the MVA. The MVA was a low-impact collision after which Petitioner reported to emergency room personnel that she "thinks" she hit the back of her head on the vehicle's headrest in the accident. Petitioner reported no loss of consciousness. No bumps or lacerations on her head were observed and the ER physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic." The evidence establishes that Petitioner is unable to work because of her cognitive impairment. Therefore, Petitioner is entitled to TTD benefits for the periods of time she was unable to work due to her cognitive impairment.

***Feuerherm v. Liberty Northwest Ins.*, 2007 MTWCC 50** (Findings of Fact, Conclusions of Law and Judgment)

Summary: Petitioner injured her shoulder in an industrial accident in August 2001. She was placed at maximum medical improvement and given an impairment rating in December 2002. She subsequently attended school and worked at jobs whose duties were within her permanent restrictions. Her shoulder was never pain free from the time of her industrial accident forward, and it significantly worsened in the summer of 2004. A 2005 MRI revealed rotator cuff tears. Upon his review of her 2002 shoulder MRI, her treating physician concluded that a tear had been missed on the older MRI. He further opined that the condition had progressed and was probably caused by Petitioner's 2001 industrial accident and that surgery was warranted. Respondent denied liability.

Held: Petitioner's current problems with her right shoulder, including the rotator cuff tears, were caused by her August 2001 industrial accident. Respondent is liable for continuing medical care for Petitioner's right shoulder.

***Barnea v. Ace American Ins. Co.*, 2007 MTWCC 58** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Physicians.

Summary: On May 17, 2004, Petitioner was injured while lifting a heavy beam as part of his job duties as a boilermaker. At the time, he primarily felt pain in his lower back and right hip. However, he also asserted that he had neck and shoulder pain which worsened significantly over time and when he decreased his pain medication. Petitioner's treating physician did not make note of Petitioner's neck and shoulder pain until July 21, 2004, although he later asserted that Petitioner had complained of neck and shoulder pain at the outset. A January 23, 2006, cervical MRI revealed a herniated disk or protrusion, and surgery was recommended. Respondent denied liability for Petitioner's neck and shoulder condition.

Held: Although Petitioner's neck and shoulder pain was not mentioned in Petitioner's medical records until two months after the industrial accident, the Court has no reason to doubt the assertion of Petitioner's doctor that he had simply failed to record it as he was focused on Petitioner's more severe lumbar complaints. Furthermore, Petitioner's subsequent treating physician also opined that Petitioner's cervical and shoulder conditions were likely caused by the industrial accident. Respondent is therefore liable.

***Rach v. Montana State Fund,* 2008 MTWCC 20** (Order Granting Respondent's Motion for Summary Judgment).

Summary: Respondent moved for summary judgment based on the grounds that no medical opinion was rendered by any physician which causally linked Petitioner's heart condition to his alleged industrial injury.

Held: Because Petitioner has failed to prove any causal link of his heart condition to his alleged accident, Respondent's motion for summary judgment is granted.

***Hagemann v. Montana Contractor Comp. Fund,* 2008 MTWCC 35** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - August 6, 2008; Dismissed by Motion - September 26, 2008*).

Related Topics: Burden of Proof, Physicians.

Summary: Petitioner developed an abdominal muscle strain after he ran up a flight of stairs and sprinted some distance to prevent an accident on a construction site. He subsequently developed pneumonia and a pulmonary embolism which he attributed to his industrial injury. Petitioner's treating physician testified that the pneumonia and pulmonary embolism were causally related to his industrial injury. Respondent accepted liability for the muscle strain but denied liability for Petitioner's pulmonary conditions, asserting that they were not caused by his industrial accident.

Held: Petitioner has met his burden of proving that it was more probable than not that his pulmonary conditions were caused by his industrial accident.

***Dewey v. Montana Contractor Comp. Fund,* 2009 MTWCC 17** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner's left wrist was injured in an industrial accident on August 7, 2007. He continued working with restrictions and subsequently reported pain and numbness in his right wrist. Electrodiagnostic testing indicated that Petitioner had bilateral carpal tunnel syndrome. Respondent obtained an IME and denied liability on causation grounds.

Held: Although the Court believes from the medical evidence presented that Petitioner has bilateral carpal tunnel syndrome, Petitioner has not proven it was causally related to his employment with Respondent's insured.

***Montana State Fund v. Zurich American Insurance Company, In re: Golt,* 2009 MTWCC 3** (Findings of Fact, Conclusions of Law and Judgment).

Summary: In 1995 Petitioner and Claimant settled a 1993 workers' compensation claim for Claimant's low back, closing indemnity benefits but leaving medical benefits open. In 1998 Claimant purchased a bar and restaurant which she ran as a sole proprietor. Claimant eventually accepted a clerical position for an employer insured by Respondent, while continuing to run her bar and restaurant. Claimant's job duties with Respondent's insured changed over time, requiring her to spend more of her workday seated. Claimant experienced increased pain in her back which she attributed to sitting in one place for too long. Petitioner's claims adjuster believed that Claimant's condition could no longer be attributed to her 1993 industrial injury and he suggested she file a claim with Respondent while Petitioner continued to pay her benefits under a reservation of rights. Respondent denied liability. Petitioner continued to pay for Claimant's medical care, including back surgery, while pursuing indemnification from Respondent.

Held: The evidence presented in this case leads me to conclude that the current condition of Claimant's back was neither caused by her 1993 industrial injury nor her 2006 occupational disease. Therefore, neither Petitioner nor Respondent are entitled to receive indemnification from the other. Since Claimant is not a party to this action, this Court cannot order her to reimburse either insurer.

CLAIM FILES

***Porter v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 42** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Benefits, Jurisdiction, Penalties, Physicians.

Summary: Petitioner injured his back in an industrial accident for which Respondent accepted liability. Petitioner sought chiropractic treatment and subsequently alleged that the treatment aggravated a preexisting cervical condition. Petitioner ceased to treat with the chiropractor and began to treat with a physician who had previously treated his cervical

condition without Respondent's approval to change treating physicians. Months after he last treated Petitioner, the chiropractor declared him to be at MMI and released him to his time-of-injury job without restriction. The chiropractor withdrew that opinion when he learned Petitioner had treated with other doctors. Prior to filing this lawsuit, Petitioner's counsel requested a complete copy of Respondent's claims file and Respondent provided only certain material until compelled to remit the remainder pursuant to subpoena. Petitioner moved this Court to adopt guidelines to compel insurers to turn over claims files upon request. Petitioner further alleged that Respondent's adjusting of his claim was unreasonable.

Held: Petitioner failed to prove that the chiropractic treatment aggravated his preexisting cervical condition. Except for the chiropractor's withdrawn opinion, no doctor has found Petitioner to be at MMI and he is therefore entitled to TTD benefits retroactive to the date of termination. Respondent's refusal to reinstate TTD benefits in light of the lack of a doctor's opinion that Petitioner was at MMI or released to return to work is unreasonable and Petitioner is therefore entitled to a penalty. Respondent's adjustment of this claim, taken as a whole, was likewise unreasonable and Petitioner is entitled to his attorney fees. This Court has no jurisdiction to set forth the claims file guidelines Petitioner desires because it does not have jurisdiction over a claim until a petition has been filed.

***Long v. New Hampshire Ins. Co.*, 2009 MTWCC 14** (Findings of Fact, Conclusions of Law and Judgment) (*Judgment Vacated and Withdrawn Pursuant to Stipulation of Parties*).

Related Topics: Penalties.

Summary: Although he remained off work from his time-of-injury employment, Petitioner returned to work at his concurrent employment as a car salesman. He informed the claims adjuster assigned to his case that he was returning to his concurrent employment, and the adjuster consented to Petitioner's continued receipt of biweekly benefits while working as a car salesman. Petitioner's claim was then transferred to another claims adjuster, who denied that Petitioner had received consent to receive benefits while working. She terminated Petitioner's benefits and demanded repayment of the benefits he had received. Petitioner requested the adjuster notes from his claim, believing that the notes would substantiate his claim that he had consent to return to his concurrent employment. The new adjuster refused to provide them and informed Petitioner he would have to petition this Court to receive them. Petitioner then petitioned this Court, arguing that he is entitled to ongoing benefits and alleging that Respondent was unreasonable in its adjustment of his claim. Respondent moved to strike Petitioner's spreadsheet which was attached to his response brief regarding waiver defense.

Held: The adjuster's notes which authorized Petitioner to receive temporary total disability (TTD) benefits after he had returned to work at his alternate employment constitutes written consent. Respondent acted unreasonably in its adjustment of Petitioner's claim by attempting to conceal the existence of the adjuster's note which authorized Petitioner's TTD benefits, by threatening Petitioner with legal action if he failed to return benefits he was rightfully paid, and by failing to maintain its claims file in accordance with § 39-71-107(3), MCA. Petitioner is entitled to ongoing and back-owing TTD benefits, his costs, attorney fees, and a 20% penalty.

Although not identical, the spreadsheet attached to Petitioner's response brief regarding waiver defense was substantially similar to the exhibit which was withdrawn at trial and was not probative of the legal issue under consideration. Respondent's motion to strike is granted.

COMMON FUND

Flynn v. Montana State Fund (On Appeal at Montana Supreme Court) (*Affirmed in Part, Reversed in Part – November 25, 2008*).

Summary/Status: Prior decision held that social security offset must be reduced by one-half of attorney fees expended in obtaining Social Security benefits. Global common fund certification granted on remand. "Settled" and "final" claims defined.

Miller v. Montana State Fund (Consolidated into *Flynn* matter).

Rausch/Ruhd v. Montana State Fund and Liberty Northwest.

Summary/Status: Prior decision held that a global common fund was created with respect to impairment awards for PTD claimants. Enforcement proceedings underway.

Reesor v. Montana State Fund (On appeal at Montana Supreme Court) (*Remanded Pending Approval of Settlement – October 15, 2008; Settlement Approved with Montana State Fund – October 16, 2008; Montana Supreme Court Order Dismissing Appeal with Prejudice – November 5, 2008*).

Summary/Status: Limitation on permanent partial disability benefits due to reaching social security retirement age declared unconstitutional by the Montana Supreme Court. Common fund certification denied on remand by Workers' Compensation Court. Enforcement procedures underway.

Ruhd v. Liberty Northwest (Global Common Fund Created with Consolidation into *Rausch/Ruhd Matter).*

Satterlee v. Lumberman's Mutual Casualty (On Appeal at Montana Supreme Court) (*Appeal Dismissed by Montana Supreme Court re: Rule 54(b) Certification; Re-Appealed to Montana Supreme Court – July 1, 2008*).

Summary/Status: Constitutional challenge to retirement provisions of § 39-71-710, MCA. Class certification has been requested.

Schmill v. Liberty Northwest Ins. (On Appeal at Montana Supreme Court) (*Findings and Conclusions of Special Master Denying Responding Insurers' Motion to Dismiss on "Gateway Legal Issues"*).

Summary/Status: The Montana Supreme Court's decision of June 7, 2005, states that *Schmill I* is retroactive to all cases not yet final or settled at time of its issuance. Common fund attorney fees are proper and the common fund created in *Schmill I* results in a global lien.

Stavenjord v. Montana State Fund (*Appealed to Montana Supreme Court – May 8, 2008; Cross-Appeal by Respondent; Remanded Pending Approval of Settlement – August 20, 2008; Settlement Approved with Montana State Fund – October 15, 2008; Montana Supreme Court Order Dismissing Appeal with Prejudice – November 5, 2008*).

Summary/Status: Previous decisions held that claimants suffering occupational diseases after June 30, 1987, may seek permanent partial disability benefits under Workers' Compensation Act. WCC granted limited common fund certification on remand. Common fund certification denied by Montana Supreme Court. Remanded to WCC for further proceedings. Enforcement proceedings underway.

CONSTITUTIONAL LAW

***Thompson v. State Of Montana*, 2005 MTWCC 53** (Order Granting Motions for Summary Judgment) (*Appealed to Supreme Court – May 15, 2006; Reversed – August 17, 2007*).

Summary: Petitioners filed an action for declaratory judgment seeking to have the Court declare subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), unconstitutional as violative of Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners subsequently filed motions for summary judgment on these issues.

Held: Summary judgment is granted. Section 39-71-604(3), MCA (2003), and section 50-16-527(5), MCA (2003), violate the petitioners' constitutional right of privacy as guaranteed by Mont. Const., Art. II, § 10, and no compelling state interest exists to justify such violation. Moreover, the Court also finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), violate the petitioners' constitutional right to due process as guaranteed by Mont. Const., Art. II, § 17, and no rational basis exists to justify such violation.

***Baker v. Transportation Ins. Co.*, 2006 MTWCC 42** (Order Granting Partial Summary Judgment to Respondent).

Summary: Petitioner Frances Baker, Personal Representative of the Estate of Bruce Baker, petitioned the Court to receive permanent partial disability benefits in the form of a 100% impairment award. Respondent Transportation Insurance Company moves this Court for summary judgment, arguing that § 39-72-703, MCA, prohibits Petitioner from receiving an impairment award. In the event the Court finds Petitioner is prohibited from receiving an impairment award under the 1985 version of the Occupational Disease Act, Petitioner asks the Court to find § 39-72-703, MCA (1985), unconstitutional.

Held: Respondent's motion for summary judgment is granted. Petitioner petitioned the

Court for permanent partial disability benefits in the form of an impairment award. Under the 1985 version of the Occupational Disease Act, § 39-72-703, MCA, prohibits occupational disease claimants from receiving partial disability benefits. The Montana Supreme Court has ruled that an impairment award is a component of partial disability benefits under pre-1987 law. *Fellenberg v. Transportation Ins. Co.*, 2005 MT 90, 326 Mont. 467, 110 P.3d 464. Accordingly, Petitioner is barred from receiving an impairment award. Section 39-72-703, MCA (1985), is constitutional. In *Eastman v. Atlantic Richfield Co.*,1 the Montana Supreme Court held that, prior to the 1987 amendments to the workers' compensation laws, a rational basis existed for unequal benefit awards to occupational disease claimants as opposed to occupational injury claimants. Though the Court has since questioned the continued validity of *Eastman*, it has not overruled it. Therefore, pursuant to *Eastman*, this Court finds § 39-72-703, MCA, constitutional.

***Horizon Custom Homes, Inc. v. Uninsured Employers' Fund, In re: Flink,* 2007 MTWCC 8** (Order Granting Motion to Dismiss).

Related Topics: Mediation, Uninsured Employers' Fund.

Summary: Respondent moved for an order to dismiss Petitioner's action on the grounds that Petitioner did not request mediation of Respondent's determination within 90 days as required by § 39-71-520(1), MCA. Petitioner argues that § 39-71-520, MCA, is unconstitutional because it violates Petitioner's right to equal protection under the law. Petitioner further argues that it should be entitled to review the medical records of the claimant because Petitioner believes Respondent may have improperly paid all or part of the claim.

Held: Section 39-71-520, MCA, is not unconstitutional because the classes at issue are not similarly situated. Petitioner is not entitled to review the claimant's medical records because Petitioner failed to appeal Respondent's determination to mediation within 90 days. Therefore, this Court is without jurisdiction to review Respondent's determination.

***Wilkes v. Montana State Fund,* 2007 MTWCC 9** (Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment) (*Appealed to Supreme Court - March 23, 2007; Affirmed - February 5, 2008*).

Summary: Petitioner moved for summary judgment, arguing that § 39-71-703, MCA (2001), is unconstitutional to the extent that it denies permanent partial disability benefits for age, education, and lifting to claimants who do not suffer a wage loss. Respondent also moved for summary judgment, arguing that § 39-71-703, MCA, is constitutional.

Held: Petitioner's motion for summary judgment is denied. Respondent's motion for summary judgment is granted. In 1995, the Legislature codified benefits based on age, lifting, and education for permanent partial disability claimants who suffered a wage loss after returning to work while providing no additional benefits based on age, education, and lifting to those claimants who received an impairment award but suffered no wage loss after returning to work. Because these two classes are not similarly situated, the Court

concludes there is no violation of Petitioner's equal protection rights.

***Weidow v. Uninsured Employers' Fund,* 2008 MTWCC 56** (Order Deeming Respondent's Motion to Dismiss to be a Motion for Summary Judgment, Denying the Motion for Summary Judgment, and Declaring § 39-71-520(2), MCA, to be Unconstitutional).

Related Topics: Mediation, Uninsured Employers' Fund.

Summary: Respondent Uninsured Employers' Fund moved for dismissal because it contends Petitioner did not timely file his petition with this Court. The UEF argues § 39-71-520(2), MCA, requires a petitioner to file a petition before this Court within 60 days of the mailing of the mediator's report or the UEF's determination becomes final. The mediator's report and recommendation was mailed on January 31, 2007. UEF notified the mediator and Petitioner that it would not accept the mediator's recommendation on February 21, 2007. Petitioner petitioned this Court on April 10, 2007, 69 days after the mediator's report was mailed. Petitioner argues that a reasonable interpretation of § 39-71-520(2), MCA, is that it is the mediator's report, and not the UEF's determination, that becomes final if no party petitions the Court within 60 days. Petitioner argues that another reasonable interpretation of the statute would allow 85 days to petition the Court. Petitioner argues that the statute is discretionary and not jurisdictional. Finally, Petitioner raises multiple constitutional challenges arguing that § 39-71-520(2), MCA, is void for vagueness, violates his constitutional right to equal protection under the law, and is an impermissible exercise of sovereign immunity.

Held: Although Petitioner's contention that the department mediator's report becomes final absent a petition filed in this Court within 60 days is a reasonable interpretation, so is UEF's interpretation that the UEF's determination becomes final if no petition is filed. The time limit provided for in § 39-71-520(2), MCA, is not tolled during the 25-day period which the parties have to notify the mediator whether they accept the mediator's recommendation. The time limits imposed in § 39-71-520, MCA, are jurisdictional and bar this Court from waiving them upon equitable grounds. However, § 39-71-520(2), MCA, can reasonably be interpreted to mean that either the UEF's determination or the department mediator's report becomes final if a petition is not filed in this Court within 60 days. Therefore, the statute is unconstitutionally vague because it requires those of ordinary intelligence to guess as to its meaning.

***Raymond v. Uninsured Employers' Fund,* 2008 MTWCC 52** (Order Denying Uninsured Employers' Fund's Motion for Reconsideration).

Related Topics: Uninsured Employers' Fund.

Summary: Respondent moved this Court to reconsider its decision dismissing the alleged uninsured employer from this case. Respondent contends that the Court did not have all the necessary facts available to it when it reached its decision, and that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action.

Held: Respondent's arguments have not persuaded the Court that the statutory procedures can be circumvented without impinging upon the due process rights of uninsured employers. Accordingly, Respondent's motion for reconsideration is denied.

***Satterlee v. Lumberman's Mut. Cas. Co.*, 2008 MTWCC 29** (Order Granting Respondent Montana State Fund's Motion for Partial Summary Judgment) (*Appealed to Montana Supreme Court - July 1, 2008).*

See Also: 2005 MTWCC 55.

Summary: Respondent Montana State Fund moved the Court for partial summary judgment regarding Petitioners' two remaining constitutional challenges to § 39-71-710, MCA: (1) Whether § 39-71-710, MCA, violates Petitioners' right to due process; and (2) Whether § 39-71-710, MCA, unconstitutionally or impermissibly discriminates against Petitioners based on their age.

Held: Respondent's motion is granted. Section 39-71-710, MCA, does not violate Petitioners' substantive due process rights because it is reasonably related to a permissible legislative objective. Section 39-71-710, MCA, does not unconstitutionally discriminate against Petitioners based on their age because it is rationally related to a legitimate governmental purpose.

***Briese v. Ace American Ins. Co.*, 2009 MTWCC 5** (Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment, Denying Petitioner's Cross-Motion for Summary Judgment, and Denying Respondent's Request for Sanctions).

Related Topics: Penalties.

Summary: Respondent moved this Court for summary judgment and also requested sanctions against Petitioner and Petitioner's counsel. Petitioner cross-motioned for summary judgment. Petitioner petitioned this Court for an increase in his average weekly wage calculation and for a 20% penalty on unpaid *Lockhart* attorney fees. Petitioner argues that vacation pay accrued during the four pay periods prior to his injury and paid post-injury should be included in his average weekly wage calculation. Petitioner further argues that the funds he withdrew from his company-sponsored 401(k) account should be utilized in his wage calculation. Respondent contends that accrued vacation paid after the date of injury and monies withdrawn from a 401(k) account are both excluded from the definition of wages pursuant to § 39-71-123, MCA (2003). Respondent also contends that Petitioner is not entitled to a 20% penalty on his *Lockhart* fees pursuant to § 39-71-2907, MCA. Respondent requests the Court to sanction Petitioner and Petitioner's counsel for their allegedly frivolous and meritless claims.

Held: Respondent's motion for summary judgment on Petitioner's entitlement to an increase in his average weekly wage calculation is granted. Respondent's motion for summary judgment regarding the 20% penalty on a *Lockhart* lien is denied. Petitioner's

cross-motion for summary judgment on the constitutionality of § 39-71-123, MCA, is denied. Respondent's request for sanctions is also denied. Vacation pay accrued preinjury but paid post-injury and employer contributions to a pension plan are excluded from the definition of wages when all parts of § 39-71-123, MCA, are read as a whole. Petitioner may seek a 20% penalty on a *Lockhart* lien because the *Lockhart* lien represents a portion of the "full amount of benefits due" Petitioner. Section 39-71-123, MCA, does not violate Petitioner's right to equal or due process. The Court does not find that Petitioner or his attorney have acted in such a way as to warrant sanctions. Even though I do not find some of Petitioner's arguments persuasive, I do not find that the arguments were advanced in bad faith or for any improper purpose.

COSTS

***Briese v. Ace American Ins. Co.*, 2006 MTWCC 6** (Order on Costs).

Summary: Petitioner filed a claim for costs pursuant to the Court's award of costs in its Findings of Fact, Conclusions of Law and Judgment. Respondent objected to two of the costs claimed by Petitioner. First, Respondent objected to paying the cost of Petitioner's copy of a transcript of a deposition taken by Respondent. Second, Respondent objected to paying the cost of a fee charged to Petitioner by an expert witness for responding to questions Petitioner's counsel posed to the expert in a letter prior to the expert's deposition.

Held: Petitioner's claim for the copy of the deposition transcript is granted. Under the rules of the Workers' Compensation Court, the Court may grant reasonable costs. As a practical consideration, a deposition transcript is generally necessary to prepare for trial and to prepare for examination of other witnesses. Additionally, the Court encourages all parties to file proposed findings of fact and conclusions of law. A deposition transcript is needed to accurately reflect the record in those findings of fact and conclusions of law. Petitioner's claim for the cost of the expert fee charged for answering Petitioner's letter prior to the deposition is denied. The letter was unnecessary since Petitioner was allowed to depose the expert at no cost and the letter was not specifically used by Petitioner in the deposition.

***Mack v. Transp. Ins. Co.*, 2007 MTWCC 19** (Order On Costs).

Summary: Petitioner submitted a claim for costs pursuant to this Court's holding in its Findings of Fact, Conclusions of Law and Judgment. Respondent objected to paying the full amount of the costs associated with taking Petitioner's deposition in Elko, Nevada. The basis for Respondent's objection is that Petitioner's deposition was taken both for his claim in this Court and a civil action Petitioner was pursuing against the State of Montana in the First Judicial District Court. Respondent, therefore, argues that Petitioner should only be entitled to recover 50% of the costs associated with this deposition.

Held: Pursuant to ARM 24.5.342(3): "The court will allow reasonable costs. The reasonableness of a given item of cost claimed is judged in light of the facts and circumstances of the case, and the issues upon which the claimant prevailed." In the present case, it is neither

reasonable, nor equitable, for Respondent to pay the full costs associated with a deposition that was taken for the benefit of two separate claims. The costs in dispute are reduced by 50%.

***Heffner v. Montana State Fund,* 2007 MTWCC 34** (Order On Costs).

Summary: Respondent filed an Application for Taxation of Costs per ARM 24.5.342.

Held: ARM 24.5.342 states that costs may be awarded to a prevailing claimant. Respondent is not a claimant. Therefore, Respondent is not entitled to costs.

***Rau v. Montana State Fund,* 2008 MTWCC 34** (Order Regarding Application for Costs).

Summary: Respondent objects to two specific items of costs which Petitioner seeks as the prevailing party: Petitioner's request for the expert fees of Dr. Olshansky; and Petitioner's request for the expert fees of Dr. Cory. Dr. Olshansky did not testify at trial or by deposition and did not provide any type of report. Dr. Cory did not testify at trial or by deposition, although his report was entered into evidence.

Held: Respondent's objections to Petitioner's application for costs regarding the expert fees of Drs. Olshansky and Cory are sustained. Dr. Olshansky's fee is disallowed because he did not testify nor was any report or medical record submitted into evidence. Dr. Cory's fee is disallowed because he did not testify at trial or by deposition, and while a report from Dr. Cory was admitted into evidence and relied upon by the Court in reaching its determination in this matter, the Court cannot determine from Petitioner's application what services are included in the fee attributed to Dr. Cory.

***Stewart v. MACO Workers' Compensation Trust,* 2008 MTWCC 22** (Order Regarding Charges for Copying Claim Files).

Summary: Petitioner moved the Court for an order requiring Respondent to provide him with a free copy of his claim file. Respondent responded that it is well-recognized in Montana law that it may charge for such copies and that its charge of $149 for copying a 283-page claim file is appropriate.

Held: Respondent may charge Petitioner the same amount as is commonly charged by businesses offering photocopy services to the public which are located in the same community as the claim file is maintained.

***Porter v. Liberty Northwest Ins. Corp.,* 2008 MTWCC 12** (Order Regarding Applications for Costs and Attorney Fees).

Summary: Respondent objects to four specific items of costs which Petitioner seeks as the prevailing party. Respondent further objects to Petitioner's application for attorney fees for the work performed on Petitioner's case by a nurse consultant. Finally, Respondent objects to Petitioner's application for fees pertaining to hours spent on the portion of Petitioner's claim specific to his cervical condition which this Court concluded was not

compensable.

Held: Respondent's objections to Petitioner's application for costs regarding the travel and lodging expenses Petitioner's counsel incurred in attending trial are sustained as not recoverable under ARM 24.5.342. Respondent's objections to Petitioner's application for costs associated with Dr. Mack's deposition are sustained since Petitioner did not prevail upon the issue to which Dr. Mack testified. For the same reason, Respondent's objections to Petitioner's application for attorney fees associated with Dr. Mack's testimony are sustained. Finally, Respondent's objection to Petitioner's application for attorney fees for work performed on his case by a nurse consultant is sustained because a nurse consultant is not an attorney and therefore her fees cannot be characterized as attorney fees.

***Russell v. Watkins & Shepard Trucking Co., Inc.*, 2009 MTWCC 27** (Order Regarding Application for Costs)**.**

Summary: Respondent objects to several specific items of costs which Petitioner seeks as the prevailing party, including deposition costs, expert witness fees, travel and lodging expenses, and copy charges for certain medical records. Respondent argues that many of these items relate only to portions of Petitioner's case where Petitioner did not prevail, and further argues that Petitioner's counsel cannot recover the costs for travel and lodging he incurred to attend trial in Helena. Respondent also argues that it cannot be required to pay for independent medical examinations which were performed by expert witnesses prior to rendering their opinions.

Held: Respondent's objections to Petitioner's application for costs regarding items which the Court found did not relate to the issue on which Petitioner prevailed are sustained. Petitioner's counsel cannot recover the costs for travel and lodging he incurred to attend the trial in this case. The Court concluded that fees relating to IMEs performed by expert witnesses are recoverable as costs as they were conducted as part of Petitioner's trial preparation and were part of the basis for the opinions the experts reached.

***Heth, Jr. v. Montana State Fund,* 2009 MTWCC 19** (Order Regarding Application for Costs).

Summary: Respondent objects to four specific items of costs which Petitioner seeks as the prevailing party: Petitioner's request for the expert fees of Dr. Rosen; two different services provided by Medical Management Resources; and Petitioner's request for reimbursement of the cost of mediation services from Corette, Pohlman & Kebe. Respondent argues that all of these expenses were incurred after this Court conducted the trial in this matter, and therefore they are not reimbursable costs under ARM 24.5.342.

Held: Respondent's objections are sustained. This Court has previously held that the expert fees of a doctor who did not testify at trial or by deposition and who did not create a report submitted into evidence are not recoverable. This Court has also previously held that the cost of appellate mediation is not a recoverable cost. ARM 24.5.342 does not provide for the reimbursement of costs which Petitioner incurred after the trial and which were not part of the Court's deliberations in reaching a decision in this matter.

COURSE AND SCOPE

***Popenoe v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 37** (Order Granting Petitioner's Motion for Summary Judgment) (*Appealed to Supreme Court - December 15, 2006; Appeal Dismissed, Case Remanded to WCC - February 7, 2007; Order Vacated and Withdrawn Pursuant to Stipulation of Counsel, and Order and Judgment of Court - February 8, 2007*).

Summary: Petitioner moved for summary judgment after Respondent denied his claim for workers' compensation benefits. Respondent filed a cross-motion for summary judgment. Petitioner broke his ankle when he fell in his employer's parking lot while removing his bicycle from the back of a friend's truck approximately five minutes before the start of his shift. Petitioner claims that his injury is compensable under the "premises rule," while Respondent argues that Petitioner's injury is not compensable because it falls under the "going and coming" rule, now codified by § 39-71-407, MCA, and because Petitioner's actions at the time of his injury were not within the scope of his employment.

Held: Summary judgment is granted in favor of Petitioner. Montana case law has established that after an employee has arrived at his employer's premises and he is no longer engaged in traveling to or from the site of his employment, an injury suffered by the employee is compensable under the "premises rule." Petitioner is entitled to attorney fees and a penalty because, in light of the applicable statutes and case law, Respondent's denial of benefits was unreasonable.

***Bevan v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 38** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - December 15, 2006; Affirmed - December 21, 2007*).

Summary: Petitioner was a customer service and sales representative for Blackfoot Telephone Communications. She was involved in a motor vehicle accident during an authorized paid break as she returned to work. Respondent denied liability on the grounds that Petitioner was outside the course and scope of her employment.

Held: Petitioner was within the course and scope of her employment when she was involved in a motor vehicle accident during an authorized paid break.

***Michalak v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 14** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – March 22, 2007; Affirmed – January 3, 2008*).

Summary: Petitioner attended a company picnic hosted by his employer at the employer's lake home and was injured while riding a wave runner on the water. Respondent denied liability.

Held: Section 39-71-118, MCA, which defines "employee" does not preclude Petitioner from receiving benefits because he was acting within the course and scope of his employment at the time of his injury even though he was engaged in a recreational activity.

***Driggers v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 60** (Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Motion for Summary Judgment) (*Appealed to Montana Supreme Court – January 28, 2008; Appeal Dismissed – March 14, 2008*).

Related Topics: Attorneys' Fees, Costs, Penalties.

Summary: Petitioner moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent opposed the motion and cross-motioned for summary judgment, contending that Petitioner failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requested an award of attorney fees, costs, and a penalty.

Held: Petitioner's motion for summary judgment is granted and Respondent's cross-motion for summary judgment is denied. Respondent is correct that both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA, must be satisfied for Petitioner's injury to be compensable. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies the second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions to the going and coming rule. This Court fails to appreciate any notable distinctions between the present case and the cases of *McMillen*, *Ellingson*, and *Gordon*, which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job. To the extent that there is any distinction between the present case and the Montana Supreme Court's decisions in *McMillen*, *Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court also finds Respondent's denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

***Rau v. Montana State Fund*, 2008 MTWCC 26** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 25, 2008; Remanded to WCC for Consideration of Entry of Judgment from Settlement - October 15, 2008).*

Related Topics: Causation.

Summary: Petitioner fainted while waiting on a customer. Her head struck the floor, which caused severe injuries. Respondent denied liability, arguing that her faint was not caused by her work or work environment.

Held: Since the medical evidence demonstrated that the reason for Petitioner's faint was more probably than not her changing position from standing to sitting as required by her job duties, Petitioner's job duties, however seemingly benign, caused the faint which in turn

caused her head injury. Therefore, Petitioner's injury occurred within the course and scope of her employment and is compensable.

CREDIBILITY

***Vallance v. Montana Contractor Comp. Fund,* 2006 MTWCC 26** (Findings of Fact, Conclusions of Law and Judgment, and Order Denying Summary Judgment).

Summary: Petitioner filed an occupational disease claim after a 2004 MRI showed that he had herniated disks. However, a 1996 MRI showed those same disks to be bulging. Petitioner has memory difficulties and did not report an accurate history to the physicians who initially concluded that his back problems were from an occupational disease, as those physicians were not aware that Petitioner had suffered several specific traumas to his back both on the job and outside of work.

Held: Petitioner, who has a history of back traumas, including two industrial accidents which he did not report to his employer, has failed to prove that his current back problems stem from an occupational disease rather than an industrial accident or some other specific trauma.

***Johnson v. Liberty Mut. Fire Ins. Co.,* 2007 MTWCC 1** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - February 2, 2007; Appeal Dismissed with Prejudice - May 14, 2007*).

Summary: Petitioner alleges she fell at work, injuring her neck and upper back, and that she reported the injury to co-managers who left that employment shortly thereafter and apparently failed to file the report. Petitioner later filed a claim form with Respondent, alleging a progressive neck injury. Respondent accepted Petitioner's claim regarding degenerative changes in her neck, but has since denied her upper back claim.

Held: Although it is certainly plausible that an injured worker may submit a report of injury which a supervisor then fails to file properly, the empirical evidence presented in this case does not support Petitioner's claim. Petitioner's extensive contemporary medical records contain no evidence that Petitioner ever claimed that she was injured in a fall at work until nearly two years after she left this employment. Petitioner's claim is denied.

***Somerville v. Montana Assoc. of Counties Workers' Comp. Trust,* 2007 MTWCC 20** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner alleges that he injured his back within the course and scope of his employment while operating a loader on June 15, 2005. Petitioner claims he informed his supervisor and a coworker about the incident shortly after it occurred. Petitioner's supervisor and coworker both claim that Petitioner was not operating a loader on that date, and that Petitioner admitted to them that he had injured his back outside of work on the evening of June 14, 2005.

Held: Although the Court was not entirely convinced of the credibility of Petitioner's supervisor and coworkers, Petitioner also was not entirely credible. The Court, therefore, concludes that Petitioner has failed to meet his burden of proof.

***Hanson v. Cedar Valley Construction, Inc., and Uninsured Employers' Fund,* 2008 MTWCC 32** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 21, 2008*; *Dismissed Pursuant to Stipulation - September 17, 2008*).

Summary: Petitioner petitioned the Court for a determination that he suffered a compensable industrial injury to his low back on May 14, 2007, during his employment with Cedar Valley Construction, Inc. Petitioner requested that the Court award temporary total disability benefits and determine the proper rate to be paid for such benefits. Additionally, Petitioner requested costs and attorney fees.

Held: The only evidence presented to the Court that Petitioner sustained an injury while working for Cedar Valley is Petitioner's own testimony. The Court does not find Petitioner's version of events to be credible. Therefore, the Court concludes that Petitioner has failed to meet his burden of proof.

***Keller v. Rochdale Ins. Co.,* 2008 MTWCC 5** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner petitioned the Court for benefits related to an alleged industrial injury arising out of her employment with Four Corners Restaurant and Casino.

Held: Based on the evidence presented at trial and on the Court's determination that Petitioner was not a credible witness, Petitioner's claim for benefits is denied. Petitioner's version of the events on the date of her alleged injury differs dramatically from her coworkers' versions. The Court finds the coworkers that testified about the events in question credible. Furthermore, the medical documentation reflects that Petitioner reported the onset of her low-back pain prior to the alleged injury date.

***Bagley v. Montana State Fund,* 2009 MTWCC 29** (Finding of Fact, Conclusions of Law and Judgment).

Related Topics: Costs, Attorneys' Fees, Penalties.

Summary: After Petitioner David Bagley suffered an industrial injury to his right arm, his employer assigned him to alternate job duties which consisted of completing coursework for an electrician's apprenticeship. Bagley asserted that he was unable to complete the hours to which his treating physician released him to return to work due to severe pain. Bagley's employer terminated his employment for failing to complete his work hours and for not reporting to work. Bagley argues he is entitled to temporary total disability benefits and that Respondent Montana State Fund has unreasonably refused to pay his benefits.

Held: The facts of this case unambiguously demonstrate that Bagley was terminated from his employment for disciplinary reasons. He refused to work the hours to which he had been released, and he then failed to report to work at all. Although Bagley's treating physicians disagree as to whether Bagley is restricted from using his right hand for writing as part of his job duties, they both agree that he is able to work in a sedentary position. Bagley's former employer made such a position available to him, and had Bagley not been fired for cause, he would have been able to continue in that position. Bagley's request for reinstatement of TTD benefits is denied. Since Bagley is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

DISABILITY

***Peterson v. Montana Schools Group Ins. Auth.*, 2006 MTWCC 14** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – May 5, 2006; Dismissed by Stipulation – July 26, 2006*)

Pertinent Notes: Permanent total disability, re-affirming *Weisgerber*.

Summary: Petitioner suffered a compensable occupational disease in his right arm and shoulder, rendering him unable to return to his custodian/maintenance position with the school district. After Petitioner reached maximum medical improvement and his treating physician approved five job analyses, Respondent terminated Petitioner's temporary total disability benefits. However, Petitioner's treating physician only considered whether Petitioner was employable in the five job analyses based solely upon the condition of Petitioner's shoulder, and did not take Petitioner's other serious health problems into consideration.

Held: Petitioner's occupational disease, taken in conjunction with the rest of his health problems and his lack of education or skills, renders him unemployable. Because he has reached maximum medical improvement, he is no longer eligible for temporary total disability benefits, as defined by § 39-71-116(34), MCA (1997). Petitioner is therefore permanently totally disabled within the meaning of § 39-71-116(24), MCA (1997).

***Benhart v. Liberty Northwest,* 2007 MTWCC 3** (Decision and Judgment).

Summary: Petitioner suffered a work-related injury on January 15, 2003. Prior to his injury, he had been diagnosed with Hepatitis C. Subsequent to Petitioner's injury, and for unrelated reasons, his Hepatitis C worsened and his health declined. Respondent denied liability for PTD benefits, arguing that although Petitioner's Hepatitis C predated his work-related injury, the Hepatitis C did not cause Petitioner's health to decline until after his work-related injury. Petitioner argued that even without taking his Hepatitis C into account, his work-related injury rendered him permanently totally disabled.

Held: The parties agreed that Petitioner's condition prior to the effects of the Hepatitis C limited Petitioner to, at most, a part-time job which his treating physician approved only on

a trial basis and that it was reasonably foreseeable that Petitioner would be physically unable to function at that level. However, no job analyses were submitted. The Court concludes that even without taking Petitioner's subsequent complications from Hepatitis C into account, he is permanently totally disabled.

DISCOVERY

***Russell v. Watkins & Shepard Trucking Co.*, 2007 MTWCC 5** (Order Regarding Respondent's Motion in *Limine*).

Summary: Respondent moved in *limine* to exclude an Addendum report and medical opinions because the report was not provided to Respondent in a timely manner.

Held: The Court ordered Petitioner to produce all discoverable medical records, excluding any reports or opinions not disclosed by the Court's deadline. The Court further held that Respondent would be granted leave to conduct an additional IME after it examined the records, if Respondent so desired.

***St. Paul Travelers Companies, Inc. v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 44** (Order Granting Motion to Compel and Awarding Attorneys' Fees and Costs).

Summary: Petitioner moved this Court to compel Respondent to answer certain requests for production and an interrogatory to which Respondent had either objected to or provided answers which Petitioner argued were incomplete. Petitioner further requested sanctions pursuant to ARM 24.5.326 in the form of attorney fees and costs.

Held: Respondent's refusal to answer certain of Petitioner's discovery requests on the basis that the information sought was irrelevant does not satisfy the requirements of Mont. R. Civ.P. 26 because these requests could reasonably lead to the discovery of admissible evidence. The Court agrees with Petitioner that certain of Respondent's responses were incomplete or nonresponsive. Petitioner is entitled to reasonable attorney fees and costs pursuant to ARM 24.5.326

***Fore v. Transp. Ins. Co.*, 2008 MTWCC 49** (Order Granting Petitioner's Motion to Compel).

Summary: Petitioner Billy Fore moves the Court to compel Respondent Transportation Insurance Company to produce approximately 800,000 pages of Environmental Protection Agency documentation contained on ten compact disks. Petitioner argues that Respondent is required to produce the documentation in discovery because Respondent asserted the "last injurious exposure" rule in its response to Petitioner's petition for benefits. Respondent responds that Petitioner's discovery request is improper because: (1) the information is not peculiarly within the possession of Respondent but is available to be obtained by other means; and (2) the information is a public record and obtainable under the Freedom of Information Act.

Held: Petitioner's motion to compel is granted. Pursuant to Rule 26(b)(1), Mont. R. Civ. P., Respondent is generally required to produce discovery that is relevant and not privileged. However, the Court shall limit discovery if it determines that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. In this case, Respondent has failed to show that Petitioner may obtain the compact disks from a source that is more convenient, less burdensome, or less expensive. Respondent may charge Petitioner a reasonable amount to recoup its cost in copying the compact disks.

***Vandervalk v. Montana State Fund,* 2009 MTWCC 24** (Order Granting Motion to Quash Subpoenas *Duces Tecum* and Denying Motion for Protective Order).

Summary: The State of Montana moved to quash two Subpoenas *Duces Tecum* which were issued by this Court and served upon it at Kurt Vandervalk's request. The State argues that the subpoenas were not served in accordance with ARM 24.5.331, that the discovery sought is unduly burdensome, and that the items requested bear no relationship to Vandervalk's petition in this Court. The State further moved for a protective order which would prohibit Vandervalk from serving additional subpoenas upon it. Vandervalk responds that he has a right to the information he seeks under Article II, § 9 of the Montana Constitution.

Held: Vandervalk's subpoenas are quashed as they were not served in accordance with ARM 24.5.331. Furthermore, even if re-served properly, the substance of Vandervalk's request is unduly burdensome upon the State and appears to largely seek information which is not relevant to his claim before this Court. However, the State's motion for a protective order is preemptive and overly broad and is therefore denied.

***Hopkins v. Uninsured Employers' Fund*, 2009 MTWCC 13** (Order Denying Uninsured Employers' Fund's Motion to Compel).

Related Topics: Uninsured Employers' Fund.

Summary: Respondent Uninsured Employers' Fund (UEF) moved the Court for an Order compelling Intervenor to produce his state and federal tax returns, with all schedules, for the years 2004 through 2007. Intervenor responds that, because the central issue in this case is whether Petitioner was Intervenor's employee on the date of his injury, November 2, 2007, the tax returns for any years besides 2007 are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. With respect to Intervenor's 2007 tax return, Intervenor states that he has not produced that return because he has not yet filed a tax return for 2007.

Held: The UEF's motion is denied. The UEF argues that the tax returns for the years 2004 through 2007 are relevant, or at least reasonably calculated to lead to the discovery of admissible evidence, "in light of Petitioner, Brock Hopkins, [sic] assertion that he worked for and was paid by [Intervenor] for the years 2004 through 2007." The UEF's argument basically boils down to Intervenor's tax returns being discoverable because the UEF

"believes" they are discoverable. Beyond the UEF's conclusory assertion, however, the UEF offers no explanation or argument as to ***how*** Intervenor's tax returns from the years preceding Petitioner's date of injury are relevant or reasonably calculated to lead to the discovery of admissible evidence.

DRUG AND ALCOHOL USE

Heth v. Montana State Fund, **2008 MTWCC 19** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - June 13, 2008; Affirmed - May 5, 2009*).

Related Topics: Burden of Proof.

Summary: Petitioner was in a single-vehicle accident involving the septic pumper truck he drove for his employer. Petitioner's blood-alcohol content (BAC) tested at .0874 shortly after the accident and beer cans were found in and around the truck. Respondent argued that it is not liable for Petitioner's workers' compensation claim because alcohol was the major contributing cause of the accident. Petitioner argued that alcohol was not the major contributing cause of the accident, and in any event, his employer knew that he drank alcohol on the job and therefore he is not barred from recovery under § 39-71-407(4), MCA.

Held: Although Respondent proved that alcohol was the major contributing cause of the accident, Petitioner proved that his employer knew he used alcohol while performing his job duties. Therefore, Petitioner is eligible for workers' compensation benefits.

EMERGENCY TRIALS

Rogers v. Montana State Fund, **2005 MTWCC 58** (Order Denying Request for Emergency Trial).

Summary: Petitioner alleges he suffered a dislocated shoulder and torn rotator cuff while in the employ of Respondent's insured. Petitioner requests an emergency trial based on his allegation that he needs shoulder surgery as soon as possible along with his medical bills paid, and payment of temporary total disability benefits.

Held: The request for an emergency trial setting is denied. ARM 24.5.311 requires good cause be shown to justify the setting of an emergency trial. To determine whether good cause exists, the rule requires that "[f]acts constituting the emergency must be set forth in the petition in sufficient detail for the court to determine whether an actual emergency exists." In the present case, other than Petitioner's conclusory allegation that he needs shoulder surgery as soon as possible and his medical bills paid, Petitioner offers no details for the Court to determine whether good cause exists to set an emergency trial.

Lyons v. Montana State Fund, **2006 MTWCC 17** (Order Denying Request for Emergency Trial).

Summary: Petitioner alleges he sustained injuries while employed by Respondent's insured. According to Petitioner's Emergency Petition, Respondent has denied liability on the grounds that Petitioner allegedly failed to timely notify his employer of his injuries pursuant to § 39-71-603, MCA (2005). Petitioner requests an emergency trial setting.

Held: The request for an emergency trial setting is denied. ARM 24.5.311 requires good cause be shown to justify the setting of an emergency trial. To determine whether good cause exists, the rule requires that "[f]acts constituting the emergency must be set forth in the petition in sufficient detail for the court to determine whether an actual emergency exists." In his petition, Petitioner expounds at length as to the circumstances of his injury and the timing of his notice to his employer. However, he devotes one sentence in support of justification for an emergency setting. In this sentence, Petitioner offers no details which would allow the Court to determine whether good cause exists to set an emergency trial.

***Travelers Insurance Company v. Ulrich-Goodwin,* 2006 MTWCC 188** (Order Denying Request for Emergency Trial).

Related Topics: Independent Medical Examinations.

Summary: Petitioner requests an emergency hearing and declaratory ruling pursuant to ARM 24.5.311 and 24.5.351.

Held: The request for an emergency setting is denied. ARM 24.5.311 requires that good cause be shown to justify the setting of an emergency trial. To determine whether good cause exists, the rule requires that "[f]acts constituting the emergency must be set forth in the petition in sufficient detail for the court to determine whether an actual emergency exists." In the present case, Petitioner has petitioned for declaratory relief seeking, apparently, a ruling that Respondent be required to travel from her home in Kalispell to an independent medical examination (IME) in Bozeman. Section 39-71-605(1)(b), MCA (2005), mandates that an IME must be conducted at a "place that is as close to the employee's residence as is practical." Although Petitioner states that it is willing to pay all expenses and endeavor to make Respondent's travel from Kalispell to Bozeman for the IME as convenient as possible, it has offered no details in its petition as to how the Court might find that an examination in Bozeman is as close to Respondent's residence as practical. Accordingly, the Court cannot find good cause exists to justify an emergency setting.

EQUITY - ESTOPPEL & WAIVER

***Johnson v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 7** (Order Denying Respondent's Motion to Compel).

Summary: Respondent Liberty Northwest Insurance Corporation moved the Court to compel Petitioner to reveal the terms of a settlement agreement between Petitioner and

International Paper Company. Liberty argues that in the original petition to the Workers' Compensation Court, Petitioner alleged that he suffers asbestos-related lung disease as a result of his employment with Champion International Company and\or Stimson Lumber Company. Petitioner entered into a disputed liability settlement agreement with International Paper (successor-in-interest to Champion) on April 20, 2005. Thereafter, International Paper was dismissed from the case. Liberty, Stimson's insurer, argued that Petitioner was judicially estopped from pursuing his claim against Liberty if the settlement terms revealed that International Paper and Petitioner settled the case for a substantial sum.

Held: Liberty's motion to compel is denied. The settlement between Petitioner and International Paper is a disputed liability settlement agreement. Because no set of facts contained in the settlement agreement would support Respondent's judicial estoppel argument, the Court will not compel Petitioner to reveal the terms of the agreement.

***Young v. Montana State Fund,* 2008 MTWCC 2** (Decision and Judgment).

Summary: On August 15, 2005, Petitioner sent a demand letter to Respondent, requesting payment of a permanent partial disability (PPD) award pursuant to *Reesor v. Montana State Fund*. The following day, the Montana Supreme Court ruled in *Otteson v. Montana State Fund*, that PPD awards were not payable to permanently totally disabled claimants and thus Petitioner was not entitled to receive the PPD benefits paid by Respondent. Respondent nonetheless paid Petitioner a PPD award on August 22, 2005. Respondent requested return of these funds on November 21, 2005. Petitioner refused, and Respondent began recouping the PPD award by reducing Petitioner's biweekly benefits by $23.78. Petitioner argues that for equitable reasons, Respondent is not entitled to the return of the PPD award.

Held: Insofar as Petitioner changed his position for the worse based upon his belief that Respondent had paid him a PPD award and would not request its return, Respondent is equitably estopped from recouping that portion of the erroneous payment from Petitioner. Therefore, of the $16,625 Respondent erroneously paid to Petitioner, Respondent is entitled to reduce Petitioner's biweekly benefits to recoup a total of $10,529.

EVIDENCE

***Thompson v. State Of Montana,* 2006 MTWCC 1** (Order Denying Intervenor's Request to Present Testimony at Oral Argument).

Summary: Intervenor, Liberty Northwest Insurance Corporation, requested leave to present testimony at the oral argument on its motion for reconsideration.

Held: Liberty's request is denied. Absent compelling reasons, the Court does not view an oral argument on a motion for reconsideration as an opportunity to present evidence that could have been adduced either with the briefing of the original motion or with the briefing

of the motion for reconsideration.

***Kilgore v. Transp. Ins. Co.*, 2008 MTWCC 47** (Order Denying Respondent's Motion to Allow a Post-Trial Deposition of Robert Marozzo and Denying Introduction of Respondent's Proposed Exhibit 24).

Summary: Respondent moves this Court to allow a post-trial deposition of Robert Marozzo, a former W.R. Grace management official, for the purpose of rebutting or impeaching Petitioner's allegedly inconsistent testimony regarding her W.R. Grace termination date. Respondent also moves the Court for admission of proposed Exhibit 24, a copy of a W.R. Grace "Pay Roll Change Notice" which indicates that Petitioner was discharged from W.R. Grace effective March 23, 1987. Respondent argues that proposed Exhibit 24 should also be admitted as either rebuttal and/or impeachment evidence.

Held: Petitioner testified at her deposition and at trial that her termination from W.R. Grace occurred in September 1987. However, although she testified at her deposition that her termination was precipitated by missed work days as a result of being snowed in while visiting family in Washington, she recalled at trial that her missed work days actually resulted from a neck injury she sustained due to a July 1987 car accident. Respondent asserts that Petitioner's inconsistent testimony opens the door for Marozzo's testimony and the admission of proposed Exhibit 24. At the time of the pretrial conference the parties stipulated that the 1987 statutes applied to Petitioner's claim. After the pretrial conference, Respondent sought to amend the Pretrial Order and sought to dispute the applicable statutory year in contravention of ARM 24.5.318(4). Respondent also sought to introduce proposed Exhibit 24 in support of its argument. Regardless of whether Respondent attempts to couch its evidence as rebuttal or impeachment evidence, Respondent is seeking to introduce untimely disclosed evidence in order to fundamentally alter the issues that were agreed to at the pretrial conference and that were incorporated into the Pretrial Order. In light of the statutory year stipulation, there is simply nothing for Respondent to either impeach or rebut.

***Hilbig v. Uninsured Employers' Fund*, 2008 MTWCC 43** (Order Denying the Uninsured Employers' Fund's Motion to Find Summary Judgment Inappropriate and Granting the UEF's Motion for an Extension of Time to Respond).

Related Topics: Uninsured Employers' Fund.

Summary: Respondent UEF moved the Court to find summary judgment inappropriate pursuant to ARM 24.5.329(1)(c), or in the alternative to grant the UEF an extension of time to file a response brief. The UEF asserted that it had recently learned of medical evidence which would place a material fact in dispute and would thereby render summary judgment inappropriate in the case.

Held: Two days before trial, the parties agreed in a conference call with the Court that the only issue in dispute was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved. The UEF conceded during this conference that

it had no medical evidence to support its contention that Petitioner was not injured to the extent claimed in the subject accident. Based upon these representations, the Court vacated the trial and directed Petitioner to file a motion for summary judgment to resolve the one legal issue that was in dispute. In light of the procedural history of this case and the representations of counsel which have contributed to this procedural history, it would be manifestly unjust if the Court were to now allow the UEF to interject medical evidence through the back door which would have not been admitted had this matter proceeded to trial as scheduled. The UEF's motion to find summary judgment inappropriate is denied. The UEF has 10 days from the date of this Order in which to respond to Petitioner's summary judgment motion, and must confine its brief only to the evidence which was admitted by stipulation and which would have been relied upon had this matter proceeded to trial as scheduled.

INCARCERATION

***Mccuin v. Montana State Fund,* 2006 MTWCC 41** (Order Denying Petitioner's Motion for Summary Judgment and Granting Summary Judgment to Respondent).

Related Topics: Benefits.

Summary: Petitioner moved for summary judgment arguing that his permanent partial disability benefits did not lapse during the time he was incarcerated.

Held: While Petitioner would otherwise have been entitled to permanent partial disability benefits pursuant to § 39-71-703, MCA, he was ineligible for such benefits during the time he was incarcerated pursuant to § 39-71-744, MCA. Although Petitioner would have been entitled to any such benefits which remained subsequent to his release from prison, due to an overpayment of his temporary total disability benefits, any amount which would otherwise have been due was offset by the amount overpaid.

INDEPENDENT CONTRACTORS

***Howe v. Uninsured Employers' Fund, In re: Kurtz,* 2006 MTWCC 27** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Uninsured Employers' Fund.

Summary: Petitioner is an independent contractor who worked on a residential construction project. Petitioner's brother worked on the project with him and introduced Petitioner to an acquaintance who then also began to work on the project. When the newly-hired worker was injured in an accident on the job, the Uninsured Employers' Fund determined that Petitioner was the employer of the injured worker. Petitioner appeals that determination.

Held: Petitioner has failed to prove by a preponderance of the evidence that he was not the employer of the injured worker.

***Kinney v. Uninsured Employers' Fund*, 2007 MTWCC 10** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Uninsured Employers' Fund.

Summary: Petitioner was injured on his first day working at a hardware store and cabinetmaking shop while he was clearing out an area of the shop in which he could create woodcarvings on cabinet doors. He claimed he was an employee hired to apprentice as a cabinetmaker and to create woodcarvings. The shop owner claimed Petitioner was an independent contractor hired only to create woodcarvings on cabinet doors and to occasionally peel logs for furniture.

Held: While only a handful of facts were established due to the short nature of Petitioner's relationship with the cabinetmaking shop prior to his injury, the facts which were established support a finding that Petitioner was an independent contractor and not an employee.

***Bowler v. Independent Contractor Central Unit,* 2008 MTWWC 42** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner appealed the Independent Contractor Central Unit's Determination to this Court. Petitioner argued that the ICCU wrongly determined that Gregory D. Holm performed services for Rick's Flooring as an employee between October 6, 2005, and December 23, 2006.

Held: Holm did not possess a valid independent contractor exemption certificate during the time he was working with Petitioner. The Court therefore applies the two-part test to determine Holm's employment status. Applying this test, the Court concludes that Gregory D. Holm was Petitioner's employee during the time at issue. The ICCU's Determination is affirmed.

***Emergency Preparedness Systems, LLC v. Scobie*, 2009 MTWCC 28** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Respondent William C. Scobie filed a wage claim against Emergency Preparedness Systems, LLC, in the Wage and Hour Unit of the Montana Department of Labor on April 3, 2007. Scobie alleged he was owed wages for work performed for EPS between January 1, 2005, and March 30, 2007. The Wage and Hour Unit referred the question of whether Scobie was an independent contractor or an employee to the Independent Contractor Central Unit. The ICCU determined Scobie was an employee of EPS and not an independent contractor. EPS appealed the ICCU determination to this Court.

Held: The Court applies a two-part test to determine Scobie's employment status as either an employee or independent contractor. First, the Court must determine whether four control factors are met. Second, the Court must determine whether the individual is engaged in an independently established trade, occupation, profession, or business. Both parts of the test must be satisfied by a convincing accumulation of undisputed evidence in order to establish independent contractor status. EPS failed to satisfy the first part of the test. Therefore, the ICCU's determination that Scobie was an employee is affirmed.

INDEPENDENT MEDICAL EXAMINATIONS

***Whitford v. Montana State Fund,* 2006 MTWCC 11** (Order Granting Motion to Require Independent Medical Examination).

Related Topics: Equity (Estoppel and Waiver).

Summary: Respondent has requested Petitioner to submit to an independent medical examination pursuant to § 39-71-605(2), MCA (2005), and Petitioner has refused. The basis for Petitioner's refusal is his contention that his occupational disease claim predated the repeal of § 39-72-602, MCA (2003), which, Petitioner contends, controls in the present case. Petitioner also contends that Respondent should be precluded by the doctrines of waiver or estoppel from seeking an IME pursuant to § 39-71-605(2), MCA (2005), because Respondent was aware that Petitioner had sought an evaluation through the Department of Labor and Industry pursuant to § 39-72-602, MCA (2003), and failed to object to this process.

Held: Respondent's motion is granted. Because the law pertaining to independent medical examinations is procedural, the current statute applies and Respondent is entitled to an independent medical examination pursuant to § 39-71-605(2), MCA (2005). Respondent was under no affirmative obligation to object to the panel examination and its failure to do so neither constitutes a waiver of Respondent's right to seek an independent medical examination nor does it estop Respondent from seeking an independent medical examination pursuant to § 39-71-605(2), MCA (2005). Although an insurer's right to an independent medical examination is not unlimited, good cause exists in the present case to require Petitioner to submit to one.

***Stillwater Mining Company v. Bunch,* 2006 MTWCC 43** (Order Denying Motion to Compel IME).

Summary: Petitioner moves to compel Respondent, who resides in Vail, South Dakota, to travel to Billings, Montana, for an independent medical examination.

Held: Petitioner's motion is denied. Petitioner may renew its motion provided it submits information to the Court consistent with the four factors set forth previously by the WCC in *Mack v. Montana State Fund,* 2005 MTWCC 28.

***Haman v. Wausau Ins. Co.*, 2007 MTWCC 49** (Order Granting Respondent's Motion to Compel Attendance at an Independent Medical Examination, and Granting in Part and Denying in Part Petitioner's Motion for Protective Order).

Summary: Respondent moved to compel Petitioner to attend a follow-up independent medical examination (IME) with Dr. Gregg Singer. Petitioner argues that a follow-up IME is unnecessary. As this motion specifically pertains to Dr. Singer, Petitioner argues that, in conducting the previous IME, Dr. Singer ignored her complaints of pain and pushed her to the point where she was in pain for several days after the examination. Moreover, Petitioner alleges that Dr. Singer did not note her pain complaints in his IME report. If the Court grants Respondent's motion to compel, Petitioner moves for a protective order to allow Petitioner's husband to be present during the entire examination and to videotape the examination.

Held: Respondent's motion to compel is granted. The Court finds good cause to allow a follow-up examination with Dr. Singer. Petitioner's motion for a protective order is granted in part and denied in part. Petitioner's husband may not be present for the examination. However, Petitioner's counsel may be present for both the history-taking portion of the IME and the examination itself. The entire IME will be recorded by a fixed video camera.

***Challinor v. Montana Ins. Guar. Assoc.*, 2008 MTWCC 21** (Order Denying Respondent's Motion to Compel an Independent Medical Examination).

Summary: Respondent moved this Court to compel Petitioner, who lives in Orofino, Idaho, to attend an IME it had scheduled in Missoula, Montana. Petitioner objected on the grounds that the IME was not scheduled as practical to his residence as required by § 39-71-605(1)(b), MCA, and further argued that Respondent's request was untimely as it was made only three days prior to the expert witness disclosure deadline required by this Court's scheduling order.

Held: Respondent's motion to compel the IME is denied on the ground that Respondent did not demonstrate it scheduled the IME as close to Petitioner's residence as practical. While Respondent's request for an IME was untimely, Respondent has been diligent in preparing for trial and good cause for the un-timeliness has been shown. If Respondent can cure the location issue by April 11, 2008, its request for an IME will not be barred for un-timeliness.

***Carlon First Strike v. Montana Contractor Comp. Fund*, 2008 MTWCC 9** (Order Granting Respondent's Motion to Compel an IME).

Summary: Respondent moved to compel Petitioner to attend an independent medical examination. Petitioner argues that since Respondent already denied liability for his claim, Respondent is not entitled to further investigation.

Held: Under § 39-71-605(2), MCA, Respondent is entitled to obtain an IME because a dispute exists concerning the claimant's physical condition and/or the cause or causes of

any injury or disability the claimant may have.

***Schoenen v. Uninsured Employers' Fund*, 2008 MTWCC 1** (Order Denying Respondent's Motion for an Independent Medical Examination).

Summary: Respondent Uninsured Employers' Fund has moved the Court to order Petitioner to attend an independent medical examination.

Held: Respondent did not request Petitioner to attend an independent medical examination until after the deadline for designating witnesses and filing expert witness' summaries had expired. Therefore, Respondent's motion is denied as untimely.

***Vandervalk v. Montana State Fund*, 2009 MTWCC 15** (Order Denying Petitioner's Motion for Emergency Independent Medical Examination and Travel Reimbursement).

Summary: Petitioner moves the Court to order Respondent to arrange and pay for an IME, and to order Respondent to reimburse Petitioner for travel expenses and for certain medications he has purchased. Respondent responds that it is not statutorily obligated to arrange and pay for the IME Petitioner seeks, and further responds that the issues regarding reimbursement of certain expenses have facts in dispute and are better resolved after a trial has been held.

Held: While an insurer has a right to request an IME pursuant to § 39-71-605, MCA, the Court is aware of no statutory or case authority for the proposition that Petitioner is entitled to obtain an IME at Respondent's expense. As to Petitioner's claim for reimbursement of certain out-of-pocket expenses, the Court agrees with Respondent that this claim is best characterized as a motion for summary judgment and is better resolved on the merits at trial. The Court therefore declines to consider this issue on summary judgment under ARM 24.5.329(1)(b). Petitioner's motion is denied.

JURISDICTION

***Baker v. Transp. Ins. Co.*, 2007 MTWCC 6** (Order on Respondent's Motion in *Limine*).

Summary: Respondent moved in *limine* to preclude Petitioner from presenting (1) evidence regarding Bruce Baker's medical expenses, and (2) a letter from Dr. Alan Whitehouse assigning various impairment ratings to Mr. Baker.

Held: Respondent's motion to preclude Petitioner from using the letter from Dr. Whitehouse at trial is moot in light of the Court's earlier ruling that Petitioner is not entitled to benefits in the form of an impairment rating. Respondent's motion to preclude Petitioner from presenting evidence regarding Mr. Baker's medical expenses based on this Court's lack of jurisdiction is denied. Under the 1985 Occupational Disease Act, jurisdiction of a claim is conferred on this Court when a dispute over benefits exists. In a letter dated August 8, 2002, Respondent denied Petitioner's claim in its entirety based on the ostensible

running of the statute of limitations. Therefore, a dispute exists and this Court has jurisdiction of the claim.

***Horizon Custom Homes, Inc. v. Uninsured Employers' Fund, In re: Flink*, 2007 MTWCC 8** (Order Granting Motion to Dismiss).

Related Topics: Constitutional Law, Mediation, Uninsured Employers' Fund.

Summary: Respondent moved for an order to dismiss Petitioner's action on the grounds that Petitioner did not request mediation of Respondent's determination within 90 days as required by § 39-71-520(1), MCA. Petitioner argues that § 39-71-520, MCA, is unconstitutional because it violates Petitioner's right to equal protection under the law. Petitioner further argues that it should be entitled to review the medical records of the claimant because Petitioner believes Respondent may have improperly paid all or part of the claim.

Held: Section 39-71-520, MCA, is not unconstitutional because the classes at issue are not similarly situated. Petitioner is not entitled to review the claimant's medical records because Petitioner failed to appeal Respondent's determination to mediation within 90 days. Therefore, this Court is without jurisdiction to review Respondent's determination.

***Michalak v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 14A** (Order Granting Petitioner's Motion Nunc Pro Tunc).

Summary: Pursuant to ARM 24.5.337, Petitioner moved to amend the Court's Findings of Fact, Conclusions of Law and Judgment in this matter, *nunc pro tunc.* Respondent opposed the motion, arguing that this Court lacks jurisdiction to decide the motion because Respondent has already appealed the Court's Findings of Fact, Conclusions of Law and Judgment to the Montana Supreme Court.

Held: Petitioner's motion is granted. Pursuant to Rule 60(a) of the Montana Rules of Civil Procedure, this Court may correct clerical mistakes at any time of its own initiative or on the motion of any party. The Montana Supreme Court has ruled that a district court retains jurisdiction to correct clerical errors even after an appeal has been perfected. The Court made a clerical error in its decision when it misidentified a person in the Findings and Conclusions. Therefore, the Court retains jurisdiction to correct its clerical error.

***Montana State Fund v. Simms*, 2008 MTWCC 3** (Order Denying Respondent's Motion to Dismiss).

Summary: Respondent moved to dismiss Petitioner's Petition for Declaratory Ruling on the grounds that this Court lacks the jurisdiction to reopen its Order and Judgment Dismissing with Prejudice more than a year and a half after it was entered. Petitioner responds that, pursuant to § 39-71-2909, MCA, this Court may review, diminish, or increase awarded benefits which were allegedly obtained through fraudulent representations.

Held: Respondent bases its motion upon *State Comp. Ins. Fund v. Chapman*. *Chapman* was decided under a previous version of § 39-71-2909, MCA, which did not include fraud or deception as grounds upon which this Court could review an award of benefits. Since the current version of the statute permits the Court to do so, the Court has the jurisdiction to consider Petitioner's Petition for Declaratory Ruling. Respondent's motion to dismiss is therefore denied.

***Stavenjord v. Montana State Fund,* 2008 MTWCC 4** (Order Regarding Identification and Notification of Potential Beneficiaries) *(Appealed to Montana Supreme Court – May 8, 2008; Remanded for Further Proceedings (Pending Settlement) – August 20, 2008; Dismissed – November 5, 2008*).

Summary: After denying common fund status in this matter, the Montana Supreme Court remanded it to this Court to determine an appropriate procedure by which potential Stavenjord beneficiaries will be identified and notified of their interests related to increased Stavenjord-type benefits and to determine whether it is impracticable or impossible for this Court to comply with the Supreme Court's remand order without the assistance of a common fund counsel.

Held: Having considered the issues presented, the Court concludes it is impossible for this Court to comply with the Supreme Court's remand order. Therefore, no further action can be taken by the Court as this matter now stands.

***Robinson v. Montana State Fund,* 2008 MTWCC 55** (Order Granting in Part Respondent's Motion to Dismiss).

Pertinent Notes: WCC now a "court of record" pursuant to § 3-1-102, MCA (2007).

Summary: Respondent moved this Court to dismiss certain causes of action which were petitioned for by Petitioner. After oral argument clarified the present status of the claims set forth in the Petition, the Court considered whether it had subject matter jurisdiction to hear Petitioner's claims.

Held: Under *Thompson v. State of Montana*, this Court lacks subject matter jurisdiction to hear Petitioner's causes of action for declaratory judgment. Petitioner's causes of action relating to benefits and a penalty on those benefits remain.

***Benton v.Uninsured Employers' Fund,* 2008 MTWCC 41** (Order Granting Respondent Alan Meyer and Erica Rodriguez, d/b/a Rogue Transportation's Motion For Summary Judgment).

Related Topics: Uninsured Employers' Fund.

Summary: Rogue Transportation, an Oregon business, moves the Court for summary judgment arguing, *inter alia*, that pursuant to § 39-71-117(4), MCA, it was not an employer of Mickey Benton at the time of his accident and death because it did not maintain a place

of business in Montana. Petitioner contends that Rogue did maintain a place of business in Montana because Rogue maintained a place of business wherever its vehicle was located.

Held: Rogue did not maintain a place of business in Montana pursuant to § 39-71-117(4), MCA. Rogue's motion for summary judgment is granted.

***Miller v. Liberty Mut. Fire Ins. Corp.*, 2008 MTWCC 18** (Order Denying Respondent's Motion to Dismiss).

Summary: Respondent moved to dismiss Petitioner's Petition for Trial on the grounds that this Court lacks jurisdiction to hear Petitioner's constitutional challenge to an administrative rule under the Montana Supreme Court's holding in *Thompson v. State of Montana and Liberty Northwest Ins. Corp*.1 as Petitioner's claim does not make a direct claim for benefits. Petitioner responded that his claim does make a direct claim for benefits and furthermore, that the holding of *Thompson* does not preclude this Court's jurisdiction in cases where indirect claims for benefits are made but only in cases where no claims for benefits are made. The Department of Labor and Industry as *amicus curiae* argued that Petitioner's claim involves a claim for benefits and that this Court therefore has jurisdiction to hear the case.

Held: In his Petition for Trial, Petitioner's prayer for relief includes asking the Court to order Respondent to pay for medical expenses for which Respondent has denied coverage because Petitioner did not obtain preauthorization as required by ARM 24.29.1515(2), the administrative rule which Petitioner argues is unconstitutional. Therefore, Respondent is mistaken in its assertion that Petitioner did not make a direct claim for benefits and this Court does have jurisdiction to hear Petitioner's claim. Whether Respondent is correct in asserting that *Thompson* does not allow this Court to hear constitutional issues which indirectly involve a claim for benefits is immaterial.

***Woodards v. Montana Ins. Guar. Assoc.*, 2008 MTWCC 11** (Order Denying Petitioner's Motion for Reconsideration).

Summary: Petitioner seeks reconsideration of the Court's Order granting summary judgment in favor of Respondent and denying Petitioner's motion for summary judgment. Petitioner argues that the Court failed to consider Petitioner's entitlement to an impairment award in rendering its decision.

Held: The Court cannot reconsider Petitioner's entitlement to an impairment award because this issue was never submitted for the Court's consideration in the first place. Accordingly, Petitioner's Motion for Reconsideration is denied.

***Montana State Fund v. Simms*, 2009 MTWCC 9** (Order Denying Motion for Grant of Use and Derivative Use Immunity).

Summary: Respondent moved this Court for an Order granting use and derivative use

immunity for himself and his wife. Petitioner and the Office of the Attorney General for the State of Montana both objected to Respondent's motion.

Held: This Court lacks the authority to grant the immunity Respondent seeks. His motion is denied.

LAST INJURIOUS EXPOSURE

***Johnson v. Liberty Northwest Ins. Corp.*, 2009 MTWCC 20** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner Raymond Johnson petitioned the Court for occupational disease benefits arising out of and in the course of his employment with Stimson Lumber Company. Johnson has lived in Libby, Montana, since 1963. He worked at the lumber mill in Libby from 1963 to 2001. Stimson purchased the mill in 1993 and was the owner on Johnson's last day of work. The mill contained asbestos in several areas including the top and floor of the big dryer and the pipe wrap surrounding steam pipes. In 2001, Johnson was diagnosed with asbestosis.

Held: Johnson suffers from an occupational disease as a result of his employment with Stimson Lumber Company. Johnson was exposed to copious amounts of asbestos during his employment at the mill from multiple sources – including his employment from 1993 through 2001, while the mill was owned by Stimson. The negative pressure environment created in the plywood plant further exacerbated Johnson's asbestos exposure. Both of Johnson's treating physicians diagnosed him with asbestosis. Johnson's exposure to asbestos during the eight years he worked for Stimson was sufficient to cause his asbestos-related diseases. Johnson's exposure to asbestos during the years he was employed by Stimson constituted his last injurious exposure to the hazard of his disease.

LOCKHART LIENS

***Dildine v. Liberty Northwest Ins. Corp.*, 2008 MTWCC 14** (Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment) *(Appealed to the Montana Supreme Court - April 15, 2008; Affirmed – March 24, 2009*).

Related Topics: Jurisdiction.

Summary: Petitioner moved the Court for summary judgment on the issue of her attorney's entitlement to a 20% fee on medical benefits pursuant to a *Lockhart* lien. Respondent cross-motioned for summary judgment, arguing that Petitioner's attorney was not entitled to the *Lockhart* fee because the attorney's efforts were not the cause of its acceptance of liability. Respondent further argued that this Court lacked jurisdiction to decide the issue of *Lockhart* liens in light of Justice Nelson's concurring opinion to the Montana Supreme Court's ruling in *Pinnow v. Montana State Fund.*

Held: Petitioner's motion is granted. As recently reiterated by the Montana Supreme Court in its majority opinion in *Pinnow v. Montana State Fund,* this Court has jurisdiction to decide disputes concerning attorney fees. Petitioner's attorney is entitled to a *Lockhart* fee because the Court finds that his efforts led to Respondent's acceptance of Petitioner's claim.

LUMP SUMS

***Miller v. Sears,* 2005 MTWCC 54** (Findings of Fact, Conclusions of Law and Judgment).

Summary: The petitioner petitioned for a lump-sum conversion of his lifetime expectancy of permanent total disability benefits.

Held: Conversion of lifetime permanent total disability benefits to a lump sum is granted. The petitioner demonstrated financial need that relates to the necessities of life. The petitioner and his wife provide a home for themselves, two of their adult children, and his elderly, disabled mother. The petitioner and his family currently reside in a multilevel rental home that is difficult for both the petitioner and his mother to navigate because of the stairs. The petitioner and his wife demonstrated that a lump sum would enable them to build or buy and modify a home which would accommodate the petitioner's and his mother's disabilities. The petitioner, with the assistance of his wife, is competent to handle his financial affairs. The petitioner and his wife have thus far managed their financial affairs with limited resources and setbacks beyond their control. However, it is apparent from the testimony that the petitioner and his wife's ability to manage their resources is being heavily taxed by their need to borrow against the petitioner's wife's retirement plan and that their ability to continue to borrow against this retirement plan is nearly exhausted. Although the Court might not otherwise exercise jurisdiction over a dispute regarding the total conversion of permanent total disability benefits pursuant to section 39-71-741(2)(d), MCA (1989), the parties in this case have agreed that this Court may properly exercise jurisdiction over this dispute pursuant to section 39-71-2905, MCA (1989).

***Barnard v. Liberty Northwest,* 2006 MTWCC 35** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – November 13, 2006; Affirmed – July 22, 2008*).

Summary: Petitioner petitioned for a lump-sum conversion of his permanent total disability benefits, testifying that he would use the money for a new mobile home, driveway improvements, a newer motor vehicle, and additional cattle. Respondent responded that Petitioner's request should not be granted because his lump sum exceeds the $20,000 limit permissible under § 39-71-741, MCA, or in the alternative, because Petitioner will not use the lump sum to obtain necessities of life.

Held: Section 39-71-741(1)(c), MCA, limits the Department of Labor and Industry to awarding lump-sum conversions in part to a total of $20,000. However, it does not limit conversions in whole to that amount. Petitioner's planned use for the proposed lump-sum conversion meets Petitioner's necessities of life pursuant to § 39-71-741(1)(c), MCA.

Furthermore, it is in his and his family's best interests and is therefore granted.

***Sanchez v. Montana State Fund,* 2007 MTWCC 25** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner petitioned for a lump-sum conversion of his permanent total disability benefits pursuant to § 39-71-741, MCA. Respondent argues that a lump-sum conversion is not in Petitioner's best interests.

Held: Petitioner has not met the lump-sum criteria of § 39-71-741(1)(c), MCA. He has failed to demonstrate financial need and the Court is not persuaded that a lump-sum conversion is in his best interests.

***Benhart v. Liberty Northwest Ins. Co.,* 2008 MTWCC 6** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner petitioned the Court to order Respondent to convert his PTD benefits to a lump sum.

Held: Petitioner's petition is denied. He has not demonstrated that he is entitled to a lump sum conversion pursuant to § 39-71-741, MCA.

MAJOR CONTRIBUTING CAUSE

***Faulkner v. Hartford Underwriters Ins. Co.*, 2007 MTWCC 15** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Last Injurious Exposure.

Summary: Faulkner petitioned the Court for payment of wages and medical benefits which he argues he is entitled to as a result of an occupational disease suffered while performing his duties as a janitor at National Electronics Warranty ("NEW"). Faulkner began working at NEW as maintenance worker on March 4, 2002, and his work in this position included sweeping, mopping, and scrubbing, and other activities involving lifting and working with his arms raised above shoulder level. Prior to his employment at NEW, Faulkner was employed by Big Sky Transfer & Storage ("Big Sky"), and filed a workers' compensation claim on January 11, 2000, relating to a lifting injury to his neck and shoulder for which Montana State Fund accepted liability. After reaching MMI for the injury, Faulkner settled his claim with the State Fund, leaving medical benefits open. He thereafter continued to treat with Dr. Peterson for his neck and shoulder pain. Beginning in March 2004, Faulkner began to experience increased right shoulder and neck pain, decreased range of motion, daily headaches, and numbness in his hands. His symptoms did not improve, and additional symptoms developed over time. On September 12, 2005, Dr. Peterson noted Faulkner's right shoulder and upper extremity symptoms had worsened and that the symptoms were an aggravation of his previous injury from January 11, 2000, and not a new injury. Dr. Peterson took Faulkner off work as of that date, and

later opined in a letter to Faulkner's counsel that Faulkner's work activity at NEW "materially and substantially aggravated his pre-existing injury" of January 11, 2000, after Faulkner had reached MMI on August 4, 2000. Following an IME of Faulkner, Dr. Schumpert noted that Faulkner's status changed over the course of less than one year after he began working at NEW, as he had markedly reduced right shoulder range of motion as of October 2004. Dr. Schumpert also opined, on a more-likely-than-not basis, that Faulkner's work at NEW aggravated his pre-existing shoulder condition.

Held: Petitioner suffers from an occupational disease as a result of performing his duties as a janitor and is entitled to wage-loss and medical benefits.

Under the 2005 version of the Montana Workers' Compensation Act, an occupational disease is defined as "harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift." § 39-71-116(20)(a), MCA. An occupation disease is considered to have arisen out of employment if: (1) the occupational disease is established by objective medical findings; and (2) the events occurring on more than a single work day or work shift are the "major contributing cause" of the occupational disease in relation to other factors contributing to the occupational disease. § 39-71-407(a) and (b), MCA. Under the new statutory framework, "major contributing cause" means "a cause that is the leading cause contributing to the result when compared to all other contributing causes." § 39-71-407(13), MCA. "When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease." § 39-71-407(10), MCA.

Under the 2005 version of the Workers' Compensation Act, the Court does not need to determine whether Faulkner's OD is related to the January 2000 injury, or is a new distinct OD unrelated to the 2000 injury. The Court only needs to determine whether the events that occurred during Faulkner's employment at NEW were the "major contributing cause" of his OD in relation to other factors. Based on the trial testimony of Dr. Peterson, the medical evidence, and the evidence regarding Faulkner's work activities, the Court concludes Faulkner sustained an OD in the course and scope of his employment at NEW. Faulkner's employment activities at NEW were the "major contributing cause" of his OD in relation to other factors.

***Liberty Northwest Ins. Corp. v. Montana State Fund, In re: Mitchell,* 2008 MTWCC 54** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - January 16, 2009*).

Related Topics: Last Injurious Exposure.

Summary: Mitchell suffers from a low-back condition as a result of his lifetime of employment in heavy-labor positions. He worked for State Fund's insured in 2002 and his back condition began to worsen at that time, although he continued to work. Mitchell was employed by Liberty Northwest's insured from August through October 2005. He filed separate claims with Liberty Northwest and State Fund for his low-back condition. Liberty Northwest argues that it is not liable for the claimant's claim under the last injurious exposure rule. Liberty Northwest also argues that the WCA requires a claimant to prove that the "major

contributing cause" of his OD is the employment where he was last injuriously exposed to the hazard of the disease.

Held: The plain meaning of § 39-71-407(9), MCA, contains no requirement that the "employment" which is the "major contributing cause" of a claimant's occupational disease derive from a particular employer. The WCC concluded that Mitchell's lifetime of heavy-labor employment was the "major contributing cause" of his low-back condition, and that he was last injuriously exposed to the hazard of his OD while he was employed by Liberty Northwest's insured. Therefore, Liberty Northwest is liable for Mitchell's low back condition.

MAXIMUM MEDICAL IMPROVEMENT

***Copeland v. Montana State Fund,* 2006 MTWCC 45** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Disability.

Summary: Three years after a head injury, Petitioner continues to exhibit symptoms and has not returned to work. Petitioner alleges he is not at MMI and that he has not received proper treatment for his industrial injury, including treatment for a preexisting depression that was exacerbated by his injury, and his TTD benefits should be reinstated. Respondent alleges that Petitioner is at MMI, has received an impairment rating, has been released to work at approved jobs, and is therefore not eligible for TTD benefits.

Held: Petitioner has not reached MMI and is entitled to reinstatement of his TTD benefits.

MEDIATION

***Howe v. Uninsured Employers' Fund, In re: Kurtz,* 2005 MTWCC 59** (Order Denying Motion To Dismiss).

Related Topics: Uninsured Employers' Fund.

Summary: Respondent, Uninsured Employers' Fund, sought to dismiss the Petition for Appeal for failure to file a timely appeal to mediation. Respondent argued that § 39-71-520(1), MCA (2003), required Petitioner to file for mediation with the mediation unit within ninety days if Petitioner disputed Respondent's determination that he was the employer of the claimant. Although Petitioner did not complete the specific form used by the UEF to appeal a determination, he did send a letter addressed to "Labor & Industry" on January 20, 2004, which expressed his disagreement with Respondent's determination and stated unambiguously that he was not the Claimant's employer. The letter was received by Respondent on January 23, 2004. However, Respondent did not forward the letter to the mediation unit until after the ninety-day period to appeal had expired.

Held: The motion to dismiss is denied. Section 39-71-520(1), MCA (2003), states that a dispute concerning Uninsured Employers' Fund benefits must be appealed to mediation within ninety days. The statute does not specifically address in any way, however, the method by which an appeal is perfected. Petitioner, acting *pro sé*, notified Respondent by letter that he disputed its determination. This letter was addressed to the Department of Labor and Industry and was received by Respondent within the ninety-day period. Although Petitioner did not use the form provided by Respondent, his letter dated January 20, 2004, put Respondent on notice of Petitioner's disagreement and substantively complied with the requirement of § 39-71-520(1), MCA (2003), to appeal to mediation within ninety days.

***Auchenbach v. Uninsured Employers' Fund*, 2006 MTWCC 13** (Order Denying Respondent's Motion to Dismiss).

Related Topics: Equity (Estoppel & Waiver), Uninsured Employers' Fund.

Summary: Respondent Uninsured Employers' Fund filed a motion to dismiss based on lack of jurisdiction due to Petitioner's failure to file her Petition for Hearing with the Workers' Compensation Court within sixty days after the mailing of the Mediator's Report and Recommendation, as required under § 39-71-520(2), MCA (2003). The UEF, however, had failed to respond to the Mediator's Report and Recommendation within twenty-five days, as required under § 39-71-2411(6), MCA (2003). Moreover, Respondent failed to respond to the Recommendation within sixty days, leaving Petitioner in the dark regarding Respondent's position on the Recommendation and whether settlement had been achieved. Pursuant to § 39-71-520(2)(c), MCA (2003), Petitioner could not file a petition before this Court until there had been a failure to reach settlement through mediation. Until Respondent fulfilled its statutory obligation to either accept or reject the Mediator's Report and Recommendation, there was no failure to reach settlement.

Held: Respondent's motion to dismiss is denied. As a fundamental matter of equity, this Court cannot allow a party to sit on its hands while a time limitation runs on a *pro sé* petitioner while, at the same time, ignoring its own affirmative statutory duty to act. Respondent is equitably estopped from relying on § 39-71-520(2)(c), MCA (2003), because it failed to comply with § 39-71-2411(6), MCA (2003), by failing to respond to the Recommendation within twenty-five days. The elements of both equitable estoppel and estoppel by silence or acquiescence are satisfied in this case. Respondent cannot stay silent in the face of a statute requiring it to respond, continue its silence after receiving a letter from the Mediation Unit requesting Respondent's response, and then rely on a time limitation set forth in a statute which precludes Petitioner from filing a petition with this Court prior to Respondent's response to the Recommendation.

***Wood v. Montana State Fund*, 2007 MTWCC 53** (Order Granting Petitioners' Motion to Amend Petition).

Summary: Petitioners move the Court to allow them to amend their petition after a deposition allegedly revealed new information regarding Respondent's adjusting of this

claim. Respondent opposes the motion, arguing that the new contentions raise issues which have not been mediated.

Held: Petitioners' motion to amend is granted. Mont. R. Civ. P. 15(a) allows amendment of a petition to be freely given where justice so requires. Although Petitioners' amended petition adds new contentions, it does not raise new issues and therefore mediation is not required.

***Benton v. Uninsured Employers' Fund,* 2008 MTWCC 23** (Order Granting Respondent Uninsured Employers' Fund's Motion to Dismiss).

Related Topics: Uninsured Employers' Fund.

Summary: Respondent Uninsured Employers' Fund moves the Court to dismiss Petitioner's Petition for Hearing because the petition was not timely filed pursuant to § 39-71-520, MCA, which requires a petition for trial in this Court be filed within sixty days of the mailing of the mediator's report. Petitioner's response brief to the UEF's motion to dismiss challenging the constitutionality of § 39-71-520, MCA, was untimely filed and the UEF argues that Petitioner's constitutional challenge should not be considered.

Held: Because Petitioner's response brief was not timely filed pursuant to ARM 24.5.316, Petitioner's substantive argument that § 39-71-520, MCA, is unconstitutional will not be considered. Pursuant to § 39-71-520, MCA, a party must file a petition with this Court within sixty days of the mailing of the mediator's report if the parties fail to reach a settlement and the parties do not stipulate in writing to a longer time period. If a petition is not filed within sixty days, the Department's determination is final. In the present case, the mediator's report was mailed on October 29, 2007. Petitioner filed the Petition for Hearing on February 27, 2008. Petitioner's petition was filed several days late and therefore must be dismissed with prejudice.

***Emergency Preparedness Systems, LLC v. Scobie,* 2008 MTWCC 44** (Order Denying Respondent's Motion to Dismiss).

Summary: Respondent moved to dismiss Petitioner's petition arguing that Petitioner failed to timely request mediation of the Independent Contractor Central Unit's employment status determination as prescribed by § 39-71-415, MCA. The crux of Respondent's argument is that Petitioner's September 12, 2007, letter – which unambiguously identified itself as an appeal of both the ICCU's Determination and the Wage and Hour Unit's Determination, and which went on for five pages to detail the manner in which Respondent disagreed with both Determinations – was not sufficient to constitute a request for mediation of the ICCU's Determination because Petitioner did not employ the precise verbiage necessary to request mediation and Petitioner did not address his letter to the correct individual at the Department of Labor and Industry. Respondent also argued that the petition should be dismissed because Petitioner failed to secure replacement counsel in a timely manner.

Held: Respondent's motion is denied. Petitioner's detailed letter satisfies the mediation

request requirements set forth in § 39-71-415, MCA. Petitioner's letter clearly expressed his disagreement with the ICCU Determination and was timely submitted to the Department of Labor and Industry. To accept Respondent's argument would be to exalt form over substance – an argument that this Court rejected in *Howe v. UEF*. Regarding Respondent's argument that the petition should be dismissed for Petitioner's failure to secure replacement counsel in a timely manner, Respondent fails to cite to any authority in support of this argument. Accordingly, Respondent's argument on this ground is not well-taken.

***Schreckendgust v. Montana Schools Group Ins. Auth.*, 2009 MTWCC 23** (Order Granting Respondent's Motion to Strike, Granting Respondent's Motion for Summary Judgment, and Denying Petitioner's Cross-Motion for Summary Judgment).

Related Topics: Statute of Limitations.

Summary: Montana Schools Group Insurance Authority moved for summary judgment on the grounds that Petitioner Judy Schreckendgust failed to file her claim in this Court within two years of MSGIA's denial of benefits, as required by § 39-71-2905, MCA. Schreckendgust contended that the parties agreed that she could seek treatment from her treating physician and MSGIA reneged on this agreement. Schreckendgust cross-motioned for summary judgment against MSGIA for "failing to uphold the agreement." In purported support of her contention that MSGIA had accepted liability for Schreckendgust to treat with her treating physician, Schreckendgust submitted the department mediator's report for the Court's consideration. MSGIA moved to strike the mediator's report and all references to the report pursuant to § 39-71-2410, MCA.

Held: MSGIA's motion to strike is granted. Section 39-71-2410, MCA, requires that, but for limited exceptions, all proceedings before the department mediator are confidential. This case does not fall within one of those exceptions. Regarding the cross-motions for summary judgment, § 39-71-2905, MCA, requires that a petition for hearing before the Workers' Compensation Judge be filed within two years after benefits are denied. MSGIA denied Schreckendgust's claim on May 18, 2005, and Schreckendgust did not file her petition in this Court until January 16, 2009, nearly three years and eight months after benefits were denied. Schreckendgust's claim is therefore time-barred pursuant to § 39-71-2905, MCA. Accordingly, MSGIA's motion for summary judgment is granted and Schreckendgust's cross-motion for summary judgment is denied.

***Emmons v. MHA Workers Compensation Reciprocal*, 2009 MTWCC 10** (Order Denying Petitioner's Motion for Summary Judgment, and Respondent's Cross-Motion for Summary Judgment, Granting Respondent's Motion to Strike Petitioner's Addendum to Her Summary Judgment Brief, and Granting Respondent's Motion to Strike Petitioner's Reply Brief).

Related Topics: Sanctions.

Summary: Petitioner moved for summary judgment. Respondent cross-motioned for summary judgment, alleging Petitioner failed to provide notice of her injury within thirty

days, as required by § 39-71-603(1), MCA. Respondent further moved the Court to strike two of Petitioner's pleadings related to the motions for summary judgment on the grounds that Petitioner's pleadings contained inadmissible information regarding confidential mediation proceedings.

Held: Petitioner's motion for summary judgment is denied because Petitioner failed to comply with the requirements of ARM 24.5.329(3). Irrespective of Petitioner's failure to comply with this rule, it is readily apparent from the briefs that Petitioner's claim is not appropriate for summary judgment because there are facts in dispute. Respondent's cross-motion for summary judgment is denied because Petitioner timely provided notice to her employer of her alleged injury in compliance with § 39-71-603(1), MCA. Respondent's motions to strike two of Petitioner's pleadings are granted on the grounds that the substance of Petitioner's pleadings attempted to place confidential mediation information before the Court which is specifically prohibited under § 39-71-2410, MCA. Petitioner has made multiple attempts to introduce information from the confidential mediation proceedings in contravention of § 39-71-2410, MCA. Petitioner is cautioned that any further attempts will result in an order to show cause why sanctions should not be imposed.

***Burke v. Roseburg Forest Products Co.*, 2009 MTWCC 32** (Order Granting Respondent's Motion to Dismiss).

Summary: Respondent moved to dismiss Petitioner's petition based on Petitioner's failure to complete the mediation process before filing her Petition for Hearing as required by § 39-71-2408(1), MCA and § 39-71-2905, MCA. Although the mediator had not issued her report prior to the filing of Petitioner's petition, Petitioner argued that the Court should nevertheless exercise jurisdiction because the purposes of mediation had been served.

Held: Respondent's motion is granted. The Court lacked jurisdiction over this matter prior to the completion of the statutorily-mandated mediation process. Although the Court might conceivably exercise jurisdiction now that the statutorily-mandated mediation process had been completed, albeit two months after the petition was filed, the case would be moving forward under a cloud of uncertainty as to whether jurisdiction could be retroactively restored. Although dismissing the petition and restarting the process is inconvenient at this juncture, it is much more impractical to proceed to trial with the specter of restarting the process after an appeal. The more prudent course of action is to dismiss the petition without prejudice.

NOTICE OF INJURY

***Siebken v. Liberty Northwest Ins. Co.*, 2007 MTWCC 48** (Decision and Judgment) (*Appealed to the Montana Supreme Court - January 17, 2008; Affirmed - October 21, 2008*).

Summary: Petitioner was involved in a work-related physical altercation on December 11, 2004. He reported the incident to his supervisor the same day, but did not report any injury because he did not know he was injured. On May 26, 2006, he learned that he had

a cervical condition which was likely caused by the altercation. Petitioner filed a claim for compensation on July 3, 2006. Respondent argues that it is not liable for Petitioner's condition because Petitioner did not report an accident and injury within 30 days as required by § 39-71-603, MCA.

Held: Petitioner failed to notify his employer within 30 days of when he learned that his work-related incident was the probable cause of his injury. His claim is therefore time-barred under § 39-71-603, MCA.

***Siebken v. Liberty Northwest Ins. Co.*, 2007 MTWCC 56** (Order Denying Petitioner's Motion for Reconsideration).

Summary: Petitioner asks the Court to reconsider its decision in this matter. It alleges that the Court erred in failing to take into account Montana Supreme Court precedent regarding what constitutes an unexpected traumatic incident or unusual strain. Respondent responds that the issue was not whether Petitioner suffered an unexpected traumatic incident or unusual strain, but whether he reported it in a timely manner. Respondent argues that the Court correctly determined that while Petitioner suffered an unexpected traumatic incident or unusual strain, Petitioner failed to report it to his employer within 30 days as required by § 39-71-603, MCA.

Held: While Petitioner may have suffered a strain which was unusual in its effect, he nonetheless did not report it within 30 days of learning that he had done so. His motion for reconsideration is denied.

NOTICE OF TERMINATION OF BENEFITS – *COLES* REQUIREMENTS

***Schoeneman v. Liberty Ins. Corp.*, 2007 MTWCC 28 (**Order Granting Petitioner's Motion for Summary Judgment).

Summary: Petitioner moved for summary judgment, requesting reinstatement of his temporary total disability benefits because Respondent terminated them without 14 days' written notice. Respondent argues that it was paying these benefits pursuant to § 39-71-608, MCA, and because Petitioner was not at maximum medical improvement when his treating physician released him to work in some capacity, § 39-71-609(2), MCA, allows an insurer to terminate temporary total disability benefits without notice.

Held: Petitioner's motion for summary judgment is granted. Respondent bases its case on reading a single sentence of a statute out of the context of the remainder of the statute and the Workers' Compensation Act as a whole. The Court is not persuaded by this interpretation.

PENALTIES

***Popenoe v. Liberty Northwest Ins. Corp.,* 2006 MTWCC 37** (Order Granting Petitioner's Motion for Summary Judgment) (*Appealed to Supreme Court - December 15, 2006; Appeal Dismissed, Case Remanded to WCC - February 7, 2007; Order Vacated and Withdrawn Pursuant to Stipulation of Counsel and Order and Judgment of Court - February 8, 2007*).

Summary: Petitioner moved for summary judgment after Respondent denied his claim for workers' compensation benefits. Respondent filed a cross-motion for summary judgment. Petitioner broke his ankle when he fell in his employer's parking lot while removing his bicycle from the back of a friend's truck approximately five minutes before the start of his shift. Petitioner claims that his injury is compensable under the "premises rule," while Respondent argues that Petitioner's injury is not compensable because it falls under the "going and coming" rule, now codified by § 39-71-407, MCA, and because Petitioner's actions at the time of his injury were not within the scope of his employment.

Held: Summary judgment is granted in favor of Petitioner. Montana case law has established that after an employee has arrived at his employer's premises and he is no longer engaged in traveling to or from the site of his employment, an injury suffered by the employee is compensable under the "premises rule." Petitioner is entitled to attorney fees and a penalty because, in light of the applicable statutes and case law, Respondent's denial of benefits was unreasonable.

***Porter v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 42** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner injured his back in an industrial accident for which Respondent accepted liability. Petitioner sought chiropractic treatment and subsequently alleged that the treatment aggravated a preexisting cervical condition. Petitioner ceased to treat with the chiropractor and began to treat with a physician who had previously treated his cervical condition without Respondent's approval to change treating physicians. Months after he last treated Petitioner, the chiropractor declared him to be at MMI and released him to his time-of-injury job without restriction. The chiropractor withdrew that opinion when he learned Petitioner had treated with other doctors. Prior to filing this lawsuit, Petitioner's counsel requested a complete copy of Respondent's claims file and Respondent provided only certain material until compelled to remit the remainder pursuant to subpoena. Petitioner moved this Court to adopt guidelines to compel insurers to turn over claims files upon request. Petitioner further alleged that Respondent's adjusting of his claim was unreasonable.

Held: Petitioner failed to prove that the chiropractic treatment aggravated his preexisting cervical condition. Except for the chiropractor's withdrawn opinion, no doctor has found Petitioner to be at MMI and he is therefore entitled to TTD benefits retroactive to the date

of termination. Respondent's refusal to reinstate TTD benefits in light of the lack of a doctor's opinion that Petitioner was at MMI or released to return to work is unreasonable and Petitioner is therefore entitled to a penalty. Respondent's adjustment of this claim, taken as a whole, was likewise unreasonable and Petitioner is entitled to his attorney fees. This Court has no jurisdiction to set forth the claims file guidelines Petitioner desires because it does not have jurisdiction over a claim until a petition has been filed.

***Driggers v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 60** (Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Motion for Summary Judgment) (*Appealed to Montana Supreme Court – January 28, 2008; Appeal Dismissed – March 14, 2008*).

Summary: Petitioner moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent opposed the motion and cross-motioned for summary judgment, contending that Petitioner failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requested an award of attorney fees, costs, and a penalty.

Held: Petitioner's motion for summary judgment is granted and Respondent's cross-motion for summary judgment is denied. Respondent is correct that both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA, must be satisfied for Petitioner's injury to be compensable. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies the second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions to the going and coming rule. This Court fails to appreciate any notable distinctions between the present case and the cases of *McMillen, Ellingson*, and *Gordon*, which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job. To the extent that there is any distinction between the present case and the Montana Supreme Court's decisions in *McMillen, Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court also finds Respondent's denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

***Quick v. Montana State Fund*, 2008 MTWCC 27** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - July 1, 2008; Cross-Appeal Filed - July 15, 2008*; *Affirmed - May 13, 2009*).

Related Topics: Benefits (Domiciliary Care).

Summary: Petitioner petitioned the Court for retroactive and future domiciliary care benefits, a higher rate of pay for domiciliary care provided by Petitioner's wife, Dolly, a 20% penalty, attorney fees, and costs. Petitioner argued that Respondent was placed on notice

that Petitioner required domiciliary care at the time of his 1984 accident, and that Dolly has been providing the care since then. Respondent argued that it did not have notice that Petitioner needed domiciliary care until February 1, 2007, the first day a medical opinion was received by it stating that domiciliary care was warranted. Prior to trial, Respondent conceded that Petitioner required 24-hour domiciliary care. Respondent began paying a rate of $7.50 per hour to Dolly, effective February 1, 2007.

Held: Petitioner is not entitled to retroactive domiciliary care prior to February 1, 2007, because Respondent was not put on notice that domiciliary care was warranted until this date. Significantly, Petitioner's attorney in 2005 stated in a letter to Respondent that a claim for domiciliary care benefits had never been made. Respondent's rate of $7.50 per hour is unreasonable. The evidence establishes that similar rates were paid for domiciliary care not provided by a person with RN skills in the late 1980s, and in the present case, the evidence establishes that Petitioner requires his care to be provided by a person with RN skills. The Court finds that, based upon the testimony of a qualified professional, $20.00 per hour is a reasonable rate of pay for Dolly because she is an RN. Further, the Court finds that Petitioner is entitled to a 20% penalty because Respondent's rate is an unreasonable rate.

***Narum v. Liberty Northwest Ins. Corp.,* 2008 MTWCC 30 (**Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 1, 2008; Affirmed – April 14, 2009).*

Related Topics: Attorneys' fees.

Summary: In March 2004, Petitioner and Respondent settled Petitioner's claim for a hip condition with Respondent accepting liability and leaving medical benefits reserved. In December 2006, Respondent ceased paying for Petitioner's medical treatment for his hip, and further refused to pay for hip replacement surgery, stating that it did not believe Petitioner's need for a hip replacement was caused by his industrial accident.

Held: Respondent cannot accept liability for a hip condition and settle a claim with medical benefits reserved and then later simply change its mind and refuse to pay benefits. Petitioner is entitled to payment of his medical benefits for treatment of his left hip, and is further entitled to his costs, attorney fees, and a penalty for Respondent's unreasonable refusal to pay benefits which were agreed to as part of the settlement of Petitioner's claim.

***Montana State Fund v. Simms,* 2008 MTWCC 39** (Order Granting Petitioner's Motion for Sanctions).

Summary: Petitioner moved for sanctions against Respondent's former counsel Geoffrey C. Angel pursuant to §§ 39-71-2901, -2914, MCA, after Angel entered a Notice of Conflict and Motion to Withdraw from his representation days before multiple depositions were scheduled to be taken. In his Notice of Conflict and Motion to Withdraw, Angel alleged that "newly discovered information" led him to recognize a potential conflict in the matter which necessitated his withdrawal from the case. In his response to Petitioner's motion for

sanctions, however, Angel asserted that it was actually the denial of his motion to dismiss and the failure of mediation to resolve the case that led him to conclude he should withdraw his representation. Finally, at a hearing on these issues ordered by the Court, Angel claimed that he had recognized the potential conflict from the time the Petition for Declaratory Ruling was filed, but that what actually triggered his motion to withdraw was learning that Petitioner was contacting witnesses for a potential criminal fraud investigation. Angel asserted that he did not provide this as a basis for withdrawing in any of his previous pleadings because he believed it might be privileged information.

Held: Angel violated § 39-71-2914, MCA, causing unnecessary delay and needless expense on Petitioner's part. Not only did Angel fail to withdraw promptly when it became evident that withdrawal would be necessary, but he also continued to take action in this case which caused Petitioner to expend time and money for depositions which then had to be cancelled because of his withdrawal. Sanctions are ordered.

***Skiff v. Montana State Fund,* 2009 MTWCC 8** (Findings of Fact, Conclusions of Law and Judgment) (*Notice of Appeal filed by Petitioner - April 3, 2009; Appeal and Cross-Appeal Dismissed with Prejudice by Stipulation of Counsel – July 20, 2009*).

Summary: Respondent accepted liability for Petitioner's industrial accident which caused Petitioner's paraplegia. Respondent currently pays Petitioner's wife $7.50 per hour for .75 hours of daily domiciliary care. Respondent converted Petitioner's benefits after Petitioner informed Respondent that he disagreed with Respondent's vocational rehabilitation proposal. Petitioner argues that he is entitled to 2.8 hours of daily domiciliary care at a rate of either $9.84 or $18.88 per hour. Petitioner further argues that Respondent's vocational proposal was unreasonable, that Respondent unreasonably converted his benefits, and that Respondent has been unreasonable in its adjustment of Petitioner's claim, and therefore the Court should award Petitioner his costs, attorney fees, and a penalty.

Held: Petitioner is entitled to have his wife provide .5 to 1 hour of daily domiciliary care at an hourly rate of $7.50 per hour until June 22, 2007, and $9.84 thereafter. Regarding the reasonableness of Respondent's vocational rehabilitation plan, after Petitioner rejected Respondent's initial proposal, Respondent requested Petitioner's input in developing an alternative plan and Petitioner failed to respond to Respondent's request. The Court therefore finds that Respondent has not failed to offer a reasonable vocational plan. Respondent properly converted Petitioner's benefits. Respondent did not act unreasonably and therefore Petitioner is not entitled to attorney fees or a penalty.

***Briese v. Ace American Ins. Co.,* 2009 MTWCC 5** (Order Granting in Part and Denying In Part Respondent's Motion for Summary Judgment, Denying Petitioner's Cross-Motion for Summary Judgment, and Denying Respondent's Request for Sanctions).

Related Topics: Sanctions, Wages.

Summary: Respondent moved this Court for summary judgment and also requested

sanctions against Petitioner and Petitioner's counsel. Petitioner cross-motioned for summary judgment. Petitioner petitioned this Court for an increase in his average weekly wage calculation and for a 20% penalty on unpaid *Lockhart* attorney fees. Petitioner argues that vacation pay accrued during the four pay periods prior to his injury and paid post-injury should be included in his average weekly wage calculation. Petitioner further argues that the funds he withdrew from his company-sponsored 401(k) account should be utilized in his wage calculation. Respondent contends that accrued vacation paid after the date of injury and monies withdrawn from a 401(k) account are both excluded from the definition of wages pursuant to § 39-71-123, MCA (2003). Respondent also contends that Petitioner is not entitled to a 20% penalty on his *Lockhart* fees pursuant to § 39-71-2907, MCA. Respondent requests the Court to sanction Petitioner and Petitioner's counsel for their allegedly frivolous and meritless claims.

Held: Respondent's motion for summary judgment on Petitioner's entitlement to an increase in his average weekly wage calculation is granted. Respondent's motion for summary judgment regarding the 20% penalty on a *Lockhart* lien is denied. Petitioner's cross-motion for summary judgment on the constitutionality of § 39-71-123, MCA, is denied. Respondent's request for sanctions is also denied. Vacation pay accrued preinjury but paid post-injury and employer contributions to a pension plan are excluded from the definition of wages when all parts of § 39-71-123, MCA, are read as a whole. Petitioner may seek a 20% penalty on a *Lockhart* lien because the *Lockhart* lien represents a portion of the "full amount of benefits due" Petitioner. Section 39-71-123, MCA, does not violate Petitioner's right to equal or due process. The Court does not find that Petitioner or his attorney have acted in such a way as to warrant sanctions. Even though I do not find some of Petitioner's arguments persuasive, I do not find that the arguments were advanced in bad faith or for any improper purpose.

***Long v. New Hampshire Ins. Co.*, 2009 MTWCC 14** (Findings of Fact, Conclusions of Law and Judgment) (*Judgment Vacated and Withdrawn Pursuant to Stipulation of Parties*).

Summary: Although he remained off work from his time-of-injury employment, Petitioner returned to work at his concurrent employment as a car salesman. He informed the claims adjuster assigned to his case that he was returning to his concurrent employment, and the adjuster consented to Petitioner's continued receipt of biweekly benefits while working as a car salesman. Petitioner's claim was then transferred to another claims adjuster, who denied that Petitioner had received consent to receive benefits while working. She terminated Petitioner's benefits and demanded repayment of the benefits he had received. Petitioner requested the adjuster notes from his claim, believing that the notes would substantiate his claim that he had consent to return to his concurrent employment. The new adjuster refused to provide them and informed Petitioner he would have to petition this Court to receive them. Petitioner then petitioned this Court, arguing that he is entitled to ongoing benefits and alleging that Respondent was unreasonable in its adjustment of his claim. Respondent moved to strike Petitioner's spreadsheet which was attached to his response brief regarding waiver defense.

Held: The adjuster's notes which authorized Petitioner to receive temporary total disability (TTD) benefits after he had returned to work at his alternate employment constitutes written

consent. Respondent acted unreasonably in its adjustment of Petitioner's claim by attempting to conceal the existence of the adjuster's note which authorized Petitioner's TTD benefits, by threatening Petitioner with legal action if he failed to return benefits he was rightfully paid, and by failing to maintain its claims file in accordance with § 39-71-107(3), MCA. Petitioner is entitled to ongoing and back-owing TTD benefits, his costs, attorney fees, and a 20% penalty. Although not identical, the spreadsheet attached to Petitioner's response brief regarding waiver defense was substantially similar to the exhibit which was withdrawn at trial and was not probative of the legal issue under consideration. Respondent's motion to strike is granted.

PHYSICIANS

***Montana State Fund v. Michael H. Pardis, D.C.*, 2006 MTWCC 21 (**Decision and Judgment).

Summary: Insurer appealed ruling by hearing officer for the Department of Labor and Industry which held that insurer was liable for payment to chiropractor for treatments provided to four patients even though those treatments far exceeded statistical averages presented by insurer's experts. The insurer did not obtain independent medical examinations of the patients and therefore could not prove the patients had reached maximum medical improvement prior to the cessation of treatment. Furthermore, as regards one of the four patients, the insurer did not have the authority to direct the patient to obtain treatment from another physician.

Held: The Final Agency Decisions are affirmed.

***Alberts v. Transportation. Ins. Co.*, 2006 MTWCC 34** (Order Granting Petitioner's Motion to Allow Medical Treatment, Granting Respondent's Motion to Preserve Evidence, and Denying Petitioner's Motion for Interim Benefits Pursuant to § 39-71-610, MCA).

Related Topics: Independent Medical Examinations.

Summary: Petitioner's treating physician diagnosed her with Thoracic Outlet Syndrome (TOS) and opined it is more likely than not a work-related condition. Respondent has refused to authorize surgery to alleviate the condition because three other doctors have disagreed with the diagnosis. Petitioner moved this Court for an order allowing her to obtain medical treatment for her TOS. Respondent objected, but requested that if the Court grants Petitioner's motion, that Respondent be allowed to have a physician observe the surgery. Petitioner further moved for interim benefits pursuant to § 39-71-610, MCA.

Held: Petitioner's motion to allow medical treatment is granted. The opinion of a treating physician is entitled to greater weight, and the diagnosis of TOS was reached with reasonable medical judgment on the part of Petitioner's treating physician. Respondent's motion to allow observation of the surgery is granted. Petitioner's motion for interim benefits pursuant to § 39-71-610, MCA, is denied because Petitioner has not demonstrated that she is entitled to them.

***Mack v. Transp. Ins. Co.*, 2007 MTWCC 16** (Findings of Fact, Conclusions of Law, and Judgment).

Summary: Petitioner petitioned the Court for an increase in his impairment award based on the opinion of his treating physician.

Held: Petitioner is entitled to an increased impairment award.

PLEADINGS

***Lanz v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 2** (Order Denying Motion for Reconsideration).

Summary: Following this Court's Order dismissing Bozeman Deaconess Health Services, Petitioner filed a motion for rehearing.

Held: The motion for reconsideration is denied. ARM 24.5.337 states that a motion for reconsideration "shall" be filed within twenty days from service of the Order for which reconsideration is sought. In this case, Petitioner's motion was filed eleven days after the time by which her motion was required to be filed.

***Shell v. Valor Ins. Co. and Fremont/Western Guar. Fund and Montana State Fund,* 2006 MTWCC 12** (Order Granting Leave to File Amended Petition).

Summary: Petitioner Nita Marlene Shell moved the Court for leave to file an amended petition, asserting that she was within the deadline set for amending pleadings from this Court's scheduling order, and further arguing that she is entitled to amend her pleading under Mont. R. Civ. P. 15(a). Respondent Valor Insurance Company filed a pleading captioned Response to Motion; however, Respondent did not substantively address the merits of Petitioner's motion, but rather raised arguments regarding the substance of Petitioner's petition.

Held: Petitioner's motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. Furthermore, failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well taken. Merely captioning a document as a "Response to Motion" but failing to substantively address the merits of that motion within the body of the brief is insufficient to constitute substantive opposition to that motion. Petitioner's motion is granted.

***Kratovil v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 38** (Order Denying Respondent's Motion for Reconsideration) (*Notice of Appeal filed - September 25, 2007).*

Summary: Respondent asks the Court to reconsider its decision in this matter because it alleges that it raised the issue of Petitioner's alleged failure to comply with the one-year claim filing period, and that this Court did not address Respondent's argument when

deciding this case. Petitioner responds that Respondent's motion should be denied because Respondent never pled a statute of limitations affirmative defense.

Held: Pursuant to ARM 24.5.302(1)(a), the Court will not consider a statute of limitations defense unless it is listed in the contentions of the Response to Petition for Hearing, and Respondent did not do so in this case. Moreover, Respondent failed to set forth a statute of limitations defense in the Pretrial Order, which supercedes all pleadings. Therefore, Respondent's motion for reconsideration on the grounds that Petitioner allegedly failed to comply with the one-year claim filing period is denied.

***Wood v. Montana State Fund,* 2007 MTWCC 53** (Order Granting Petitioners' Motion to Amend Petition).

Summary: Petitioners move the Court to allow them to amend their petition after a deposition allegedly revealed new information regarding Respondent's adjusting of this claim. Respondent opposes the motion, arguing that the new contentions raise issues which have not been mediated.

Held: Petitioners' motion to amend is granted. Mont. R. Civ. P. 15(a) allows amendment of a petition to be freely given where justice so requires. Although Petitioners' amended petition adds new contentions, it does not raise new issues and therefore mediation is not required.

***Stokes v. Liberty Mutual,* 2009 MTWCC 21** (Order Denying Respondent's Motion to Dismiss).

Summary: Liberty moved to dismiss Stokes' petition, alleging that Stokes failed to state a claim for which relief could be granted. Stokes responded that Liberty has not paid medical benefits to which he is entitled under the settlement, and further discussed his dissatisfaction with the settlement, including allegations of mutual mistake of fact.

Held: In his petition, Stokes asked the Court to order Liberty to pay for medical expenses that he believes are related to his industrial injury, and further requested that his settlement be reopened "due to ongoing disability." His response to Liberty's motion further expounds upon these prayers for relief. While not perfectly pled, Stokes' petition states a claim for which relief could be granted. Liberty's motion is therefore denied.

***Keller v. Liberty Northwest, Inc.*, 2009 MTWCC 25** (Order Granting Leave to File Amended Response to Petition for Hearing).

Summary: Respondent Liberty Northwest, Incorporated, moved to amend its response to Petitioner Kimberly M. Keller's Petition for Hearing. Liberty's amendment would include a contention that Keller's request to reopen her settlement is barred by the two-year statute of limitations found in § 27-2-203, MCA. Keller opposes Liberty's motion on the grounds that the amendment Liberty seeks would be futile because the two-year statute of limitations had not run.

Held: Liberty's motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. In this case, Liberty sought to amend its response only a day after it had timely filed its response to Keller's petition. Although Keller characterizes Liberty's proposed statute of limitations defense as "nonviable," that is not readily apparent from the pleadings. Liberty should be allowed to pursue discovery on this matter and determine whether the defense is viable.

PROCEDURE

***Fleming v. International Paper Co.*, and *Liberty Northwest Ins. Corp.*, 2005 MTWCC 57**
(Order Denying the Filing of a Reply Brief and Reconsideration of Order Dismissing International Paper Company) (*Appealed to Supreme Court – December 27, 2005; Reversed and Remanded – September 23, 2008*).

Summary: The petitioner alleges he suffers from asbestos-related lung disease as a result of his employment at a Libby, Montana, lumber mill from 1960 to May 28, 1998. The mill was owned by Champion International Company until November 1, 1993. It was thereafter owned by Stimson Lumber Company, which is insured by Liberty Northwest Insurance Corporation. Upon its motion, this Court previously dismissed International Paper Company pursuant to § 39-72-403, MCA (2003). Liberty Northwest's motion to dismiss was denied. From the Court's order dismissing International Paper, Petitioner sought reconsideration. This motion was denied on August 17, 2005. Petitioner then filed a second motion for reconsideration of this Court's Order denying Petitioner's first motion for reconsideration. With respect to Petitioner's second motion for reconsideration, he also moves the Court for leave to file a reply brief.

Held: Petitioner's motion for leave to file a reply brief is denied. ARM 24.5.337 provides only for the filing of an initial brief in support of a motion for reconsideration and, upon receipt of a response or the expiration of the time for filing a response, the motion is deemed submitted. The rule does not allow for the filing of a reply brief in support of a motion for reconsideration and the Court declines to read such a provision into the rule. Being fully briefed, Petitioner's motion for reconsideration is deemed submitted and is denied. Although ARM 24.5.337(1) allows for reconsideration of *any* order or decision of the Workers' Compensation Court, which would include an order denying a motion for reconsideration, the interests of judicial economy and finality mandate that the Court will entertain motions for "re-reconsideration" only under compelling circumstances. The Court finds no such circumstances in the present case. To the extent that Petitioner raises a new argument which was not raised in either his response to International Paper's motion to dismiss, by way of Petitioner's own motion before International Paper was dismissed from this suit, or in Petitioner's first motion for reconsideration, the Court does not reach the merits of this argument because it is being raised for the first time in Petitioner's second motion for reconsideration. Petitioner has offered no compelling reason why this argument was not raised before a second motion for reconsideration. Absent such a compelling reason, the Court will not consider an issue that has not been raised previously despite ample opportunity to do so.

***Thompson v. State of Montana*, 2006 MTWCC 4** (Order Granting Leave to Respond to Respondent's Request to Take Judicial Notice).

Summary: Respondent, State of Montana, requested the Court to take judicial notice of legal arguments raised in another case pending before this Court. Petitioners requested leave to respond to those matters which are the subject of judicial notice and the State objects to Petitioners' request.

Held: Leave to respond is granted. Pursuant to Rule 202(e), Mont. R. Evid., when a party requests the Court to take judicial notice of law, another party to the action is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the law noticed.

***Satterlee v. Lumberman's Mut. Cas. Co.*, 2006 MTWCC 8** (Order Granting Respondents' Motions to Strike).

Summary: Respondents, Montana State Fund and Lumberman's Mutual Casualty Company, filed motions to strike a reply brief and affidavit filed by Petitioners in support of a motion for reconsideration.

Held: Respondents' motions to strike are granted. ARM 24.5.337 provides only for the filing of an initial brief in support of a motion for reconsideration and, upon receipt of a response or the expiration of the time for filing a response, the motion is deemed submitted.

***Lapier v. Montana State Fund* and *Associated Loggers Exchange*, Third-Party Respondent, 2006 MTWCC 25** (Order Granting Motion to Join Third-Party Respondent).

Summary: Respondent moved to join another insurer as a third-party respondent because Petitioner worked for an employer insured by the proposed third party, Associated Loggers Exchange (ALE), after Petitioner worked for Respondent's insured. Petitioner has filed an occupational disease claim. Respondent alleges that ALE is liable for Petitioner's occupational disease pursuant to § 39-72-303(1), MCA (2003) – the last injurious exposure rule. Petitioner objects to the joining of the third party as untimely. ALE objects on the grounds that Petitioner's claim against it, if any, would be barred by the statute of limitations. Alternatively, ALE argues that it could not be subject to the last injurious exposure rule because Petitioner did not reach maximum medical improvement before working for ALE's insured.

Held: While the proposed third-party respondent may have valid defenses in this case, those defenses cannot be resolved in a motion to join, but must be decided on their merits. Furthermore, the alleged un-timeliness of Respondent's motion to join was caused by Petitioner's delayed response to Respondent's discovery request. Motion to join is granted.

***Satterlee v. Lumberman's Mut. Cas. Co.,* 2006 MTWCC 29** (Order Granting Petitioners' Motion for Reconsideration, Continuing Respondents' Cross-Motion for Summary Judgment, and Granting Petitioners Leave to File a Motion and Brief
Pursuant to Mont. R. Civ. P. 56(F)).

Summary: This Court erroneously certified the Order denying Petitioners' motion for partial summary judgment as final for purposes of appeal. Petitioners filed a motion for reconsideration asking the Court to remove final certification of the Order. In this same motion, Petitioners also request leave to conduct additional discovery before a final Order is entered.

Held: Petitioners' motion for reconsideration is granted to the extent that final certification is removed from the Order denying Petitioners' motion for partial summary judgment. The Court prematurely certified the Order as final in light of the fact that the Order was a denial of Petitioners' motion for summary judgment. Since the denial of Petitioners' motion did not constitute a final judgment, the Court was required to justify its certification pursuant to Rule 54(b), Mont. R. Civ. P. Also pending before this Court is a cross-motion for summary judgment by Respondent Montana State Fund. Before any final Order is entered in this matter, however, Petitioners request leave to conduct additional discovery. In their motion, Petitioners do not specify the nature or subject matter of the discovery they are seeking although the Court can infer it would pertain to the financial evidence adduced by Respondents. With respect to this request, the Court will temporarily reserve ruling on State Fund's motion for summary judgment and will entertain a motion, pursuant to Rule 56(f), Mont. R. Civ. P., in which Petitioners shall state specifically: (1) the discovery they are seeking; and (2) how the proposed discovery could preclude summary judgment for Respondents.

***Satterlee v. Lumberman's Mut. Cas. Co.,* 2006 MTWCC 36** (Order Denying Petitioners' Motion to Allow Discovery and Granting Respondents' Cross-Motion for Partial Summary Judgment) *(Appealed to Supreme Court – December 1, 2006; Appeal Dismissed Without Prejudice Re: Rule 54(b) Certification – December 11, 2007; Re-Appealed to Montana Supreme Court - July 1, 2008*).

Summary: In its July 12, 2006, Order, this Court granted Petitioners leave to file a motion and brief pursuant to Mont. R. Civ. P. 56(f) to state specifically: (1) the discovery they are seeking; and (2) how the proposed discovery could preclude summary judgment for Respondents. Additionally, the Court continued Respondents' cross-motion for partial summary judgment.

Held: Petitioners' motion for an order allowing discovery is denied. Respondents' cross-motion for partial summary judgment is granted.

***Cardwell v. Uninsured Employers' Fund,* 2007 MTWCC 31** (Order On Costs).

Summary: Petitioner filed an application for costs twelve days after this Court's entry of Findings of Fact, Conclusions of Law and Judgment. Respondent objected upon the

grounds that Petitioner's application was untimely pursuant to ARM 24.5.342(1).

Held: ARM 24.5.303(3) states that three days shall be added to the prescribed period of time whenever service of a notice or other paper is accomplished by mail. Accordingly, Petitioner had thirteen days from this Court's entry of judgment within which to file his application for costs. Therefore, the application, which was filed twelve days after the Court's entry of Findings of Fact, Conclusions of Law and Judgment was timely.

***Benton v. Uninsured Employers' Fund et al.*, 2008 MTWCC 40** (Order Granting Petitioner's Motion for Reconsideration).

Related Topics: Uninsured Employers' Fund.

Summary: Petitioner moves the Court for reconsideration of its Order Granting the Uninsured Employers' Fund's Motion to Dismiss because Petitioner's brief in opposition to the Uninsured Employers' Fund's Motion was not timely.

Held: Petitioner's motion is granted. The Court granted the UEF's motion to dismiss with prejudice because Petitioner failed to set forth any circumstances establishing good cause for the untimely filing of her response brief. In her Motion for Reconsideration, Petitioner explained that her brief was untimely because her counsel mistakenly calendared the deadline pursuant to Mont. R. Civ. P. 6(a) instead of ARM 24.5.303. In light of the dispositive nature of the Order granting UEF's motion and the explanation Petitioner has now offered, the Court is satisfied that Petitioner's motion for reconsideration should be granted.

***Pinnow v. Halverson, Sheehy & Plath, P.C.*, 2008 MTWCC 31** (Order Granting Intervenor's Motion for Summary Judgment, Dismissing Intervenor, and Changing Caption).

Summary: Intervenor moved for summary judgment on whether the Stipulation for Settlement is valid and enforceable. Respondent concurred with Intervenor's arguments. Petitioner did not file a response to Intervenor's motion.

Held: Under ARM 24.5.329(3), any party opposing a motion for summary judgment shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party. Under ARM 24.5.316(4), failure to file briefs may subject the motion to summary ruling. Failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well-taken. Intervenor's motion for summary judgment is therefore well-taken.

***Raymond v. Uninsured Employers' Fund,* Respondent, and *Foothills Research Institute, LLC, Market Research Group,* and *Joseph Seipel,* Uninsured Employers, 2008 MTWCC 45** (Order Dismissing Uninsured Employers, Denying All Pending Motions, and Amending Caption).

Related Topics: Uninsured Employers' Fund.

Summary: Various motions have been submitted and are pending in this case. This order resolves underlying issues concerning which parties are properly named in this action at this time.

Held: Upon consideration of the motions and the applicable statutes, the Court concludes that the procedural posture of this case is such that the alleged uninsured employers are not proper parties to this action at this time. They are dismissed from this case and all pending motions are denied. The caption shall be amended to reflect only Petitioner and Respondent as named parties.

***Keller v. Liberty Northwest, Inc.*, 2009 MTWCC 25** (Order Granting Leave to File Amended Response to Petition for Hearing).

Summary: Respondent Liberty Northwest, Incorporated, moved to amend its response to Petitioner Kimberly M. Keller's Petition for Hearing. Liberty's amendment would include a contention that Keller's request to reopen her settlement is barred by the two-year statute of limitations found in § 27-2-203, MCA. Keller opposes Liberty's motion on the grounds that the amendment Liberty seeks would be futile because the two-year statute of limitations had not run.

Held: Liberty's motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. In this case, Liberty sought to amend its response only a day after it had timely filed its response to Keller's petition. Although Keller characterizes Liberty's proposed statute of limitations defense as "nonviable," that is not readily apparent from the pleadings. Liberty should be allowed to pursue discovery on this matter and determine whether the defense is viable.

REOPENING OF SETTLEMENTS

***Gamble v. Sears,* 2006 MTWCC 5** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – February 23, 2006; Affirmed – June 5, 2007*).

Summary: Petitioner petitioned for the May 15, 2001 settlement by the parties to be set aside based on a mutual mistake of fact.

Held: Where Petitioner and Respondent mistakenly believed Petitioner had reached MMI at the time the parties entered a settlement agreement, when in fact she had a non-healed fracture in her neck which required surgical treatment, the mutual mistake of fact was

material and the settlement agreement is set aside.

***Kruzich v. Old Republic Ins. Co.*, 2006 MTWCC 23** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - June 14, 2006; Reversed – June 10, 2008*).

Summary: Petitioner, who suffered a traumatic brain injury as a result of an industrial accident, petitioned to have the compromise and settlement agreement set aside when he developed a movement disorder many years later as a result of the injury.

Held: The settlement is set aside because of a mutual mistake of a material fact.

***Harter v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 39** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - December 18, 2006; Dismissed - May 23, 2007*).

Summary: Petitioner petitioned to reopen his settlement with Respondent. Petitioner alleged that Respondent committed fraud in settling Petitioner's claim and asked the Court to award past and future workers' compensation benefits.

Held: Petitioner is not entitled to reopen his settlement. Respondent did not commit fraud when it settled Petitioner's claim. No mutual mistake of fact exists. Petitioner is not entitled to any further workers' compensation benefits.

SANCTIONS

***The St. Paul Travelers Companies, Inc. v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 44** (Order Granting Motion to Compel and Awarding Attorneys' Fees and Costs).

Summary: Petitioner moved this Court to compel Respondent to answer certain requests for production and an interrogatory to which Respondent had either objected to or provided answers which Petitioner argued were incomplete. Petitioner further requested sanctions pursuant to ARM 24.5.326 in the form of attorney fees and costs.

Held: Respondent's refusal to answer certain of Petitioner's discovery requests on the basis that the information sought was irrelevant does not satisfy the requirements of Mont. R. Civ.P. 26 because these requests could reasonably lead to the discovery of admissible evidence. The Court agrees with Petitioner that certain of Respondent's responses were incomplete or nonresponsive. Petitioner is entitled to reasonable attorney fees and costs pursuant to ARM 24.5.326

SETTLEMENT LANGUAGE

***Jones v. Albertsons, Inc.*, 2007 MTWCC 26** (Order Denying Request for Stipulated Settlement, Dismissal, and Judgment).

Summary: The parties have asked this Court to approve a joint Stipulation for Dismissal and Order for Dismissal with Prejudice in settlement of a pending claim.

Held: The parties' request is denied because it contains terms that are unenforceable, as well as contrary to statute and the expressed public policy of this State as set forth in § 39-71-105, MCA. The WCC declined to approve a settlement that sought to settle "any and all claims, filed or unfiled, known or unknown, that she may have had under the Workers' Compensation Act or Occupational Disease Act as a result of her employment with the Respondent, Albertsons, Inc." The parties essentially asked the WCC to allow them to enter into a legally invalid contract. The WCC declined to do so.

STATUTES OF LIMITATIONS

***Clemons v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 16** (Order Denying Respondent's Motions to Dismiss, for Summary Judgment, and for a Protective Order).

Summary: Petitioner alleges he suffers from asbestos-related lung disease as a result of his employment at a Libby, Montana, lumber mill from 1969 to 1995. The mill was owned by St. Regis Paper Company and then Champion International Company until November 1, 1993. It was thereafter owned by Stimson Lumber Company, which is insured by Respondent Liberty Northwest Insurance Corporation. Respondent moves for a protective order until the Court rules on the pending motions to dismiss and for summary judgment. Respondent moves for dismissal and summary judgment based on the following assertions: (1) Petitioner failed to file a petition within two years from the date Respondent denied Petitioner's claim as required under § 39-71-2905(2), MCA; (2) Petitioner is judicially estopped from claiming his work at Stimson is the cause of his asbestos-related disease because of Petitioner's complaint in a separate district court case; and (3) Petitioner's treating physician agreed with an article which put the latency period at fifteen years or more between exposure to asbestos and signs of exposure appearing on x-ray.

Held: Respondent's motions to dismiss and for summary judgment are denied. Likewise, Respondent's motion for a protective order is denied. (1) Section 39-71-2905(2), MCA, is a statute of limitations that reads "[a] petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." However, § 39-71-2905(2), MCA, does not apply to this case because this statute became effective July 1, 1997, and applies "to claims for injuries occurring on or after [the effective date]." Petitioner alleges the exposure to asbestos that caused his asbestos-related disease occurred between 1969

and March 31, 1995, the date on which he ceased working at the mill. (2) Petitioner's district court complaint against other parties who allegedly were responsible for Petitioner's exposure to asbestos is not inconsistent with his claim that asbestos from his employment at Stimson contributed to or caused his asbestos-related lung disease. (3) Respondent's evidence concerning the latency period for asbestos-related lung disease does not establish as an uncontroverted matter that Petitioner was not injuriously exposed to asbestos during his employment with Stimson. Accordingly, this is an issue that should be decided at trial.

Cardwell v. Uninsured Employers' Fund, **2006 MTWCC 20** (Order Denying Respondent's Motion to Dismiss).

Related Topics: Independent Contractors, Occupational Diseases, Uninsured Employers' Fund.

Summary: Respondent Uninsured Employers' Fund filed a motion to dismiss based on Petitioner's failure to file a claim alleging an occupational disease within one year, as required by § 39-72-403, MCA (2003). In Petitioner's original Petition for Trial he stated that he suffered an injury arising out of and in the course of his employment. Petitioner did not allege that he suffered an occupational disease. After the deposition of Petitioner's chiropractor, who opined that Petitioner's injury could be considered a repetitive-use injury which happened over time, Petitioner filed an Amended Petition for Trial and alleged that he suffered an injury or occupational disease.

Held: Respondent's motion to dismiss is denied. Petitioner initially believed his condition was caused by a single incident that occurred while hanging Sheetrock on or about July 20, 2004. All documentary evidence including his first report of injury and his original petition to the Court reflected this belief. After the deposition of Petitioner's chiropractor, however, he became aware that his injury could have been caused by repetitive use over time, after which he filed the Amended Petition for Trial alleging an occupational disease. Since Petitioner neither knew nor reasonably should have known that his condition may have been the result of an occupational disease before he was alerted to this possibility by the testimony of his chiropractor, the statute of limitations did not begin to run until that time. Accordingly, Petitioner's Amended Petition for Trial was filed within the time prescribed by § 39-72-403, MCA (2003).

Palmer v. Safeco, **2006 MTWCC 44** (Order Granting Respondent's Motion for Summary Judgment).

Summary: Respondent moved for summary judgment regarding Petitioner's request for ongoing medical benefits, arguing that because Petitioner had not used his benefits for more than 60 consecutive months, his benefits terminated pursuant to § 39-71-704(1)(e), MCA (1997). Petitioner responded that the statute should be tolled because he was receiving medical treatment for difficulties which he was unaware stemmed from his industrial accident at the time of treatment.

Held: Because § 39-71-704(1)(e), MCA (1997), is a statute of repose, it cannot be tolled.

Therefore, Respondent's motion for summary judgment is granted.

***Evans v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 23** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Supreme Court - June 29, 2007; Cross-Appeal filed - July 5, 2007, August 14, 2007; Appeals Dismissed by WCC following successful mediation*).

Summary: Petitioner filed occupational disease claims for shoulder, arm, and neck conditions and carpal tunnel syndrome which he alleges developed as a result of years of work in the tire industry. Respondent denied liability, arguing that Petitioner knew or should have known about his carpal tunnel syndrome several years ago and that his claim for benefits is therefore untimely. Respondent further argues that Petitioner's arm, shoulder, and neck conditions are not an occupational disease, but rather an industrial injury and that Petitioner's claim is time-barred because he did not file a claim within 30 days of the incident which Respondent alleges caused these conditions.

Held: Petitioner's carpal tunnel syndrome claim is timely because he neither knew nor should have known he was suffering from carpal tunnel syndrome as a result of an occupational disease until he was diagnosed by a doctor. Petitioner's arm and shoulder conditions, as well as the cervical spondylosis and degenerative disk disease in his neck are occupational diseases and therefore his claim for benefits regarding those conditions is timely. Petitioner's syrinx is not work-related and therefore Respondent is not liable for this condition. The medical evidence also indicates that Petitioner's disk herniation was more probably than not caused by an industrial accident during the week of August 14, 2005. Therefore, Petitioner's November 14, 2005, claim for his disk herniation is untimely pursuant to § 39-71-603(1), MCA. Accordingly, Respondent is not liable for medical treatment and wage-loss compensation benefits specifically attributable to the herniated disk.

***Shelley v. American Home Assurance Co.*, 2007 MTWCC 52** (Order Granting Respondent/Insurer's Motion to Dismiss).

Summary: Respondent moves for dismissal of the petition in this case because it alleges that Petitioner failed to file a written claim for benefits within a year of when he knew or should have known that he suffered from an occupational disease and therefore Petitioner's claim is untimely pursuant to § 39-71-601, MCA (2005). Petitioner responds that he did not need treatment for his condition until 2005, and therefore the statute of limitations did not begin to run until that point.

Held: Respondent's motion is granted. Petitioner filed a district court action in 2001 alleging that he suffered from an asbestos-related condition as a result of his employment with Respondent's insured. However, he did not file an occupational disease claim until January 2006. The fact that Petitioner alleged he did not exhibit symptoms or require treatment for his condition until December 2005 does not negate the fact that he knew at least as early as the time when he filed the district court action that he suffered from a work-related occupational disease.

***Kilgore v. Transp. Ins. Co.*, 2008 MTWCC 51** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed To Montana Supreme Court - January 2, 2009; Dismissed by Motion – March 13, 2009*).

Related Topics: Penalties.

Summary: Petitioner was an employee of the W.R. Grace mine in Libby and was diagnosed with asbestos-related disease. Petitioner petitioned the Court for permanent partial disability benefits in the form of an impairment award in the amount of 45 percent. Petitioner also sought a penalty, costs, and attorney fees. Before trial, the parties stipulated to Petitioner's treating physician's 45 percent impairment rating. Respondent argued, however, that Petitioner's claim was time-barred pursuant to this Court's ruling in *Fleming v. International Paper Co.*

Held: Petitioner is entitled to permanent partial disability benefits in the form of a 45 percent impairment rating. After the trial in this matter concluded, the Montana Supreme Court reversed this Court's decision in *Fleming*. The Supreme Court's ruling is dispositive of Respondent's statute of limitations defense in this matter. Respondent's denial of Petitioner's claim was premised upon this Court's ruling in *Fleming*, which was not reversed until after this matter had gone to trial. Respondent's reliance on this Court's decision was reasonable. Therefore, Petitioner is not entitled to attorney fees or a penalty.

***Tinker v. Montana State Fund*, 2008 MTWCC 33** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - 09/02/08, Cross Appeal Filed by Petitioner - 09/11/08, Affirmed by Montana Supreme Court - 06/24/09*).

Summary: On July 24, 2007, Petitioner sought medical treatment for hip and knee pain. He related the pain to a slip and fall incident at work which had occurred two or three years earlier, but he did not seek treatment because he believed the injury would heal itself. X-rays revealed that Petitioner had severe degenerative hip disease in his left hip. Petitioner filed claims for an industrial injury and occupational disease. Respondent denied his occupational disease claim since his condition could be attributed to a single incident on a specific date, and declined his industrial injury claim as untimely.

Held: Petitioner's claim that he suffered an occupational disease is denied because he never reached MMI from his industrial injury prior to his hip condition allegedly being aggravated by his work. Under § 39-71-601(1), MCA, a claimant must file a claim for benefits within 12 months of the industrial accident. Section 39-71-601(2), MCA, provides that insurers may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of lack of knowledge of disability, latent injury, or equitable estoppel. In the present case, Petitioner did not suffer a disability until he could no longer perform his job duties. Therefore, the time requirement is waived under § 39-71-601(2)(a), MCA, and his claim is not time-barred.

***Boyd v. Zurich American Ins. Co.*, 2009 MTWCC 26** (Order Granting Respondent's Motion for Summary Judgment) (*Appealed to Montana Supreme Court – September 9, 2009*).

Summary: Zurich American Insurance Company moved for summary judgment on the grounds that Petitioner Terry Boyd failed to petition this Court within two years of Zurich's denial of benefits, as required by § 39-71-2905(2), MCA. Boyd argued that Zurich's motion should be denied because the statute of limitations should not have commenced running until June 2008, when Boyd obtained the medical evidence needed to support his claim. Boyd contends that the language of § 39-71-2905(2), MCA, implies a tolling of the time limitation until the "dispute arises and is supported by admissible medical evidence."

Held: Zurich's motion is granted. Section 39-71-2905(2), MCA, unambiguously requires that "[a] petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." Although this Court has recognized a tolling of this time limit while the dispute is in mandatory mediation, it has never recognized an "implied tolling" until the claimant obtains medical evidence in support of his claim, and the Court declines to do so now.

STAY AND BOND

Harrison v. Liberty Northwest Ins. Corp. and Stillwater Mining Co., **2006 MTWCC 24** (Order Denying Stay of Execution and Waiver of Supersedeas Bond).

Summary: Respondent Stillwater Mining Company was held liable by this Court for Petitioner's benefits. Stillwater then filed a notice of appeal and has moved for a stay of execution of judgment and a waiver of the bond requirement. At the present time, Petitioner's benefits are being paid by Liberty Northwest Insurance Corporation under a reservation of rights. Liberty and Petitioner both object to the stay of execution. Petitioner and Liberty further argue that, should the stay be granted, the bond requirement should not be waived.

Held: Stillwater's motion is denied. In determining whether to grant a stay of execution, the Court must balance the interests of all the parties involved. In the present case, should Stillwater prevail on appeal, it would be able to obtain restitution from Liberty.

Sturchio v. Wausau Underwriters Ins. Co., **2007 MTWCC 12** (Order Denying Stay of Execution of Judgment And Denying Waiver of Supersedeas Bond).

Summary: Respondent has appealed the Court's decision regarding Petitioner's weekly TTD benefit rate to the Montana Supreme Court. Respondent now moves this Court for a stay of execution of judgment, and to waive posting of a supersedeas bond. Petitioner does not object to the stay of execution of judgment, but requests that the Court require Respondent to post the supersedeas bond or make a cash deposit.

Held: Respondent has provided no evidence to support its argument that the Court should allow it to waive the supersedeas bond requirement. Since a stay of execution of judgment pending appeal may only be had by either presenting a supersedeas bond or by waiver of

the bond, Respondent's motion for stay of execution must also be denied.

***Michalak v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 14B** (Order Granting Respondent's Motion to Stay and Waiver of Supersedeas Bond).

Summary: Respondent moved the Court to stay the judgment in this matter and waive posting of a supersedeas bond. Petitioner opposes staying the judgment, but in the event the Court grants Respondent's motion to stay, Petitioner does not object to waiver of the supersedeas bond.

Held: Respondent's motion to stay the judgment is granted. In determining whether to grant a stay of judgment, the Court must balance the interests of all the parties involved. In light of the circumstances in the present case, Petitioner's right to benefits does not outweigh Respondent's right to appeal. Respondent's unopposed motion to waive the supersedeas bond is also granted.

***Evans v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 32** (Order Granting Stay of Execution of Judgment and Waiver of Supersedeas Bond).

Summary: Respondent has appealed this Court's Findings of Fact, Conclusions of Law and Judgment to the Montana Supreme Court. Respondent now moves this Court for a stay of execution of judgment and to waive posting of a supersedeas bond. Petitioner objects.

Held: Although styled as opposition to both the stay of judgment and waiver of the supersedeas bond, Petitioner concedes in his brief that the posting of a supersedeas bond would allay his concerns and allow the Court to issue a stay. Regarding the requirement that Respondent post a bond, Respondent has shown to the satisfaction of the Court that adequate security exists for payment of the judgment. Therefore, the requirement that Respondent post a supersedeas bond is waived.

***Oksendahl v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 35** (Order Granting Stay of Execution of Judgment and Waiver of Supersedeas Bond).

Summary: Liberty has appealed this Court's Order Granting Petitioner's Motion for Summary Judgment to the Montana Supreme Court. Liberty now moves this Court for a stay of execution of judgment, and to waive posting of a supersedeas bond. Alternatively, Liberty moves for an order requiring Petitioner to repay any monies paid pursuant to this judgment if this Court's Order is reversed on appeal. Petitioner does not oppose the motion to stay but does oppose the motion to waive the posting of a supersedeas bond.

Held: Liberty has shown to the satisfaction of the Court that adequate security exists for payment of the judgment. Therefore, the requirement that Liberty post a supersedeas bond is waived.

SUMMARY JUDGMENT

***Pinnow v. Halverson, Sheehy & Plath, P.C.*, 2008 MTWCC 31** (Order Granting Intervenor's Motion for Summary Judgment, Dismissing Intervenor, and Changing Caption).

Summary: Intervenor moved for summary judgment on whether the Stipulation for Settlement is valid and enforceable. Respondent concurred with Intervenor's arguments. Petitioner did not file a response to Intervenor's motion.

Held: Under ARM 24.5.329(3), any party opposing a motion for summary judgment shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party. Under ARM 24.5.316(4), failure to file briefs may subject the motion to summary ruling. Failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well-taken. Intervenor's motion for summary judgment is therefore well-taken.

***Liberty Northwest Ins. Corp. v. Montana State Fund, In re: Mitchell*, 2008 MTWCC 10** (Order Declining Consideration of All Pending Summary Judgment Motions, Pursuant to ARM 24.5.329(1)(B)).

Summary: All parties in this matter have filed respective summary judgment motions, with a total of seventeen substantive briefs presented for the Court's consideration in resolving the motions.

Held: The Court declines to consider these motions pursuant to ARM 24.5.329(1)(b).

***Emmons v. MHA Workers Comp. Reciprocal*, 2008 MTWCC 10** (Order Denying Petitioner's Motion for Summary Judgment, and Respondent's Cross-Motion for Summary Judgment, Granting Respondent's Motion to Strike Petitioner's Addendum to Her Summary Judgment Brief, and Granting Respondent's Motion to Strike Petitioner's Reply Brief).

Summary: Petitioner moved for summary judgment. Respondent cross-motioned for summary judgment, alleging Petitioner failed to provide notice of her injury within thirty days, as required by § 39-71-603(1), MCA. Respondent further moved the Court to strike two of Petitioner's pleadings related to the motions for summary judgment on the grounds that Petitioner's pleadings contained inadmissible information regarding confidential mediation proceedings.

Held: Petitioner's motion for summary judgment is denied because Petitioner failed to comply with the requirements of ARM 24.5.329(3). Irrespective of Petitioner's failure to comply with this rule, it is readily apparent from the briefs that Petitioner's claim is not appropriate for summary judgment because there are facts in dispute. Respondent's cross-motion for summary judgment is denied because Petitioner timely provided notice to her employer of her alleged injury in compliance with § 39-71-603(1), MCA. Respondent's motions to strike two of Petitioner's pleadings are granted on the grounds

that the substance of Petitioner's pleadings attempted to place confidential mediation information before the Court which is specifically prohibited under § 39-71-2410, MCA. Petitioner has made multiple attempts to introduce information from the confidential mediation proceedings in contravention of § 39-71-2410, MCA. Petitioner is cautioned that any further attempts will result in an order to show cause why sanctions should not be imposed.

TERMINATION FOR CAUSE

Stancil v. MHA Workers' Comp. Trust, **2007 MTWCC 51** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Benefits.

Summary: Petitioner petitioned the Court for permanent partial disability and rehabilitation benefits. Petitioner was precluded from returning to his time-of-injury job as an ICU nurse and performed transitional work until a nurse recruiter position was developed and subsequently offered to Petitioner. Petitioner was employed in that position for several weeks before he was terminated.

Held: Petitioner is not entitled to permanent partial disability and rehabilitation benefits because he did not suffer a wage loss as a result of his injury. The employer properly placed Petitioner in a transitional job. The nurse recruiter position was not specifically created for Petitioner. He was qualified to perform the nurse recruiter responsibilities because of his education, work experience, and personal and professional skills. Petitioner reviewed the job description and applied for the position. Petitioner was discharged from his employment because of behavioral issues, not as a result of his injury. Therefore, the Court concludes that Petitioner did not suffer an actual wage loss as a result of his injury and is not entitled to permanent partial disability or rehabilitation benefits.

Bagley v. Montana State Fund, **2009 MTWCC 29** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Benefits, Credibility.

Summary: After Petitioner David Bagley suffered an industrial injury to his right arm, his employer assigned him to alternate job duties which consisted of completing coursework for an electrician's apprenticeship. Bagley asserted that he was unable to complete the hours to which his treating physician released him to return to work due to severe pain. Bagley's employer terminated his employment for failing to complete his work hours and for not reporting to work. Bagley argues he is entitled to temporary total disability benefits and that Respondent Montana State Fund has unreasonably refused to pay his benefits.

Held: The facts of this case unambiguously demonstrate that Bagley was terminated from his employment for disciplinary reasons. He refused to work the hours to which he had

been released, and he then failed to report to work at all. Although Bagley's treating physicians disagree as to whether Bagley is restricted from using his right hand for writing as part of his job duties, they both agree that he is able to work in a sedentary position. Bagley's former employer made such a position available to him, and had Bagley not been fired for cause, he would have been able to continue in that position. Bagley's request for reinstatement of TTD benefits is denied. Since Bagley is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

UNINSURED EMPLOYERS' FUND

Hilbig v. Uninsured Employers' Fund, **2008 MTWCC 43** (Order Denying The Uninsured Employers' Fund's Motion to Find Summary Judgment Inappropriate and Granting the UEF's Motion for an Extension of Time to Respond).

Related Topics: Evidence.

Summary: Respondent UEF moved the Court to find summary judgment inappropriate pursuant to ARM 24.5.329(1)(c), or in the alternative to grant the UEF an extension of time to file a response brief. The UEF asserted that it had recently learned of medical evidence which would place a material fact in dispute and would thereby render summary judgment inappropriate in the case.

Held: Two days before trial, the parties agreed in a conference call with the Court that the only issue in dispute was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved. The UEF conceded during this conference that it had no medical evidence to support its contention that Petitioner was not injured to the extent claimed in the subject accident. Based upon these representations, the Court vacated the trial and directed Petitioner to file a motion for summary judgment to resolve the one legal issue that was in dispute. In light of the procedural history of this case and the representations of counsel which have contributed to this procedural history, it would be manifestly unjust if the Court were to now allow the UEF to interject medical evidence through the back door which would have not been admitted had this matter proceeded to trial as scheduled. The UEF's motion to find summary judgment inappropriate is denied. The UEF has 10 days from the date of this Order in which to respond to Petitioner's summary judgment motion, and must confine its brief only to the evidence which was admitted by stipulation and which would have been relied upon had this matter proceeded to trial as scheduled.

Raymond v. Uninsured Employers' Fund, **2009 MTWCC 7** (Order Denying Uninsured Employers' Fund's Motion for Leave to File a Third-Party Petition).

Summary: In previous Orders, this Court dismissed the alleged uninsured employers as parties to this litigation because the Uninsured Employers' Fund had not fulfilled the due process requirements of § 39-71-2401, MCA, and the departmental procedure set forth in § 39-71-506, MCA. The Court then denied the UEF's motion for reconsideration. The UEF

now moves the Court for leave to file a third-party petition against the alleged uninsured employers.

Held: Since the UEF has not demonstrated that it has fulfilled the requirements of §§ 39-71-506, -2401, MCA, its motion for leave to file a third-party petition against the alleged uninsured employers is denied.

***Hopkins v. Uninsured Employers' Fund*, 2009 MTWCC 12** (Order Denying Uninsured Employers' Fund's Motion for Reconsideration and Dismissing Uninsured Employers' Fund's Third-Party Petition for Statutory Indemnity).

Summary: The Uninsured Employers' Fund (UEF) moved this Court to reconsider its decision dismissing the alleged uninsured employer from this case *sua sponte*. The UEF argues that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action. The UEF also filed a third-party petition for statutory indemnity simultaneously with its response to the petition in this matter.

Held: The UEF's arguments have not persuaded the Court that the statutory procedures can be circumvented without impinging upon the due process rights of alleged uninsured employers, and its motion for reconsideration is therefore denied. The UEF's third-party petition is dismissed because the UEF has not provided any indication that it complied with the due process requirements of § 39-71-506, MCA.

***Wilson v. Uninsured Employers' Fund*, 2009 MTWCC 22** (Order Denying Uninsured Employers' Fund's Motion for Reconsideration and Granting Leave to File a Third-Party Petition).

Related Topics: Jurisdiction.

Summary: The Uninsured Employers' Fund moved this Court to reconsider its decision dismissing the alleged uninsured employer as a respondent in this case, arguing that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action. Alternatively, the UEF asked the Court to grant it leave to file a third-party petition against Elk Mountain Motor Sports, Inc. After the Legislature enacted new legislation, the UEF supplemented its briefing and argued that under the new statutory language, the putative uninsured employer is properly joined as a party. Elk Mountain objected to the UEF's motion, arguing that it could not be joined without denial of due process because it had not participated in the mandatory department mediation. The Court ordered the parties to participate in a department mediation prior to the Court's reaching a decision on the UEF's motion. The UEF subsequently informed the Court that the mediation had been completed and requested that the Court consider its motion.

Held: The UEF's motion for reconsideration is denied. Elk Mountain cannot simply be reinstated as a respondent that is ostensibly liable to the claimant because § 39-71-516, MCA, makes it clear that claims by injured employees against uninsured employers are exclusively within the jurisdiction of the district court. Although the newly enacted

legislation does not specify in what capacity an uninsured employer is joined, it appears to the Court that the only capacity in which the UEF could join Elk Mountain would be as a third-party respondent. Therefore, the UEF's request for leave to file a third-party petition against Elk Mountain is granted.

Hilbig v. Uninsured Employers' Fund, **2009 MTWCC 6** (Order Granting Petitioner's Motion for Summary Judgment).

Summary: Petitioner was injured in an automobile accident while within the course and scope of her employment. Her employer was uninsured, and Petitioner filed a claim against the Uninsured Employers' Fund and pursued a third-party action against the driver of the other vehicle. The UEF has refused to pay Petitioner's benefits until her third-party claim is resolved. Petitioner has moved for summary judgment, arguing that she is entitled to benefits from the UEF because she is statutorily permitted to pursue her remedies concurrently.

Held: Petitioner's motion for summary judgment is granted. The Workers' Compensation Act explicitly permits Petitioner to pursue her remedies concurrently, while the UEF has no legal authority for refusing to pay benefits for which it has admitted liability.

H&D Investments, LLC v. Uninsured Employers' Fund, **2009 MTWCC 1** (Order Granting Petitioner's Motion for Summary Judgment).

Summary: Petitioner contracted with Enzo Construction, Inc. to perform and oversee construction and remodel work on a condominium. During the performance of this work, one of Enzo's employees was injured. Enzo was not carrying workers' compensation insurance at the time and the UEF accepted liability and paid benefits. The UEF then sought reimbursement from Petitioner for the benefits paid. The UEF contends Petitioner is liable for reimbursement either pursuant to § 39-71-405(1), MCA, or § 39-71-405(3), MCA, or under a theory of "equitable reimbursement." Petitioner moves for summary judgment regarding the UEF's claim for reimbursement.

Held: Petitioner's motion for summary judgment is granted. Section 39-71-405(1), MCA, provides any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses "from the contractor primarily liable." In its response brief, the UEF concedes that Petitioner is ***not*** the contractor primarily liable. Therefore, the UEF cannot pursue reimbursement from Petitioner under this subsection. The UEF's construction of § 39-71-405(3), MCA, is wholly unsupported by the plain language of the statute itself and does not support a claim for reimbursement against Petitioner. As for the UEF's claim for "equitable reimbursement," while the authority upon which the UEF relies may support a claim for reimbursement against Enzo as the injured worker's employer, it does not support a reimbursement claim against Petitioner.

VOCATIONAL REHABILITATION – RETURN TO WORK

***Markovich v. Liberty Northwest,* 2007 MTWCC 21** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Benefits.

Summary: When Petitioner neared the completion of an 84-week vocational rehabilitation plan which allowed him to get a master's degree, he asked Respondent to pay for additional schooling so he could complete a thesis which would make him eligible for a Ph.D. program. Respondent refused. Petitioner petitioned this Court for additional vocational rehabilitation benefits, additional benefits under § 39-71-703, MCA, additional auxiliary benefits, and attorney fees and a penalty for Respondent's actions from the day of Petitioner's injury until the present.

Held: Petitioner has not suffered a wage loss that would entitle him to PPD benefits under § 39-71-703, MCA, because he is now qualified to earn more than he earned at his time of injury employment. Petitioner is not entitled to an additional vocational rehabilitation plan, nor is he entitled to auxiliary benefits for travel in excess of the $4,000 which Respondent has paid. Petitioner is not entitled to attorney fees or a penalty.

***Burns v. Flathead County, Montana,* 2008 MTWCC 37** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner worked as a heavy equipment mechanic for the Flathead County Road and Bridge Department until he was injured in the course and scope of his employment. Before he returned to work, Petitioner's position as a mechanic was eliminated by the department. When the department posted the position of bridge equipment operator, Petitioner requested a hiring preference; however, Respondent did not hire Petitioner for this position. Petitioner petitioned the Court for a determination that he was entitled to a hiring preference pursuant to § 39-71-317, MCA, for the position of bridge equipment operator.

Held: Petitioner was not entitled to a hiring preference for the position of bridge equipment operator because the position is not consistent with his vocational abilities.

***Sizemore v. Copper King Hotel and Convention Center,* 2008 MTWCC 8** (Order Granting Respondent's Motion to Dismiss) (*Notice of Appeal Filed by Petitioner - February 20, 2008; Appeal Dismissed With Prejudice - June 17, 2008*).

Summary: Respondent moved to dismiss Petitioner's petition in which she requested that the Court enforce the reemployment preference of § 39-71-317, MCA, against The Cimarron Group, Inc., which now owns the Copper King Hotel and Convention Center.

Petitioner was employed at the Copper King Hotel and Convention Center when it was owned by Allegra Partnership, and Allegra Partnership owned the business on the date of Petitioner's industrial injury.

Held: Under § 39-71-317(3), MCA, a claimant's reemployment preference lies with her date-of-injury employer. Since Petitioner's place of employment was owned by Allegra Partnership and not The Cimarron Group, Inc., on the date of her injury, her entitlement to a reemployment preference lies with Allegra Partnership and not The Cimarron Group, Inc. Respondent's motion to dismiss is therefore granted.

WAGES

***Negethon v. Montana State Fund,* 2006 MTWCC 40** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner was receiving unemployment benefits when he accepted a job as a day laborer. Approximately four hours into his first shift, he suffered an industrial injury. Respondent calculated Petitioner's TTD benefits by basing his average weekly wage on one day's employment. Petitioner disputes this calculation method.

Held: Petitioner was hired for a single day's work, and his unemployment benefits are not "wages" for the purposes of calculating his average weekly wage pursuant to § 39-71-123, MCA.

***Sturchio v. Wausau Underwriters Ins. Co.,* 2007 MTWCC 4** (Decision and Judgment) *(Appealed to Supreme Court - February 12, 2007; Affirmed – December 6, 2007*).

Summary: Petitioner suffered a work-related injury on June 11, 2005. At the time of her injury, Petitioner held five concurrent employments. Petitioner and Respondent disagree as to whether § 39-71-123, MCA, requires the same calculation method to be used in determining the average weekly wage for every concurrent employment, and disagree about the weekly rate of Petitioner's TTD benefits.

Held: Petitioner correctly interprets § 39-71-123, MCA, to allow for different calculation methods to be used for each concurrent employment, according to the specific facts of each employment. Using Petitioner's average weekly wage calculations for four of her five employments, and the Court's own calculations for a fifth employment, the Court concludes Petitioner is entitled to a weekly rate of $318.48 in TTD benefits.

***Hand v. Uninsured Employers' Fund,* 2007 MTWCC 33** (Order Concerning Compensation Rate Issue).

Summary: Petitioner has been totally disabled due to an occupational disease since January 15, 1993. In the late 1980s, Petitioner's employer gave him twenty-five head of breeding cattle in lieu of future wage increases. Petitioner's employer also provided

pasture year round, provided hay in the winter, medical supplies, veterinary services, and breeding bulls for the cattle. Petitioner contends that the offspring of these cattle should be included as wages in determining his total disability rate.

Held: The value of the calves born from the twenty-five head of cattle given to Petitioner by his employer in the late 1980s are not wages for the purpose of determining Petitioner's total disability rate. However, the value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls for the twenty-five head of cattle provided to Petitioner by his employer are wages for the purpose of determining Petitioner's total disability rate. The parties shall calculate the actual value of these services and supplies for the year preceding Petitioner's last day of work and factor that amount into the calculation for determining Petitioner's total disability rate.

***Montana Municipal Ins. Auth. v. Roche,* 2007 MTWCC 47** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court – January 15, 2008; Affirmed – June 10, 2009*).

Summary: Petitioner alleges that Respondent received a "wage" from a business which he ran as a sole proprietor during the time that Respondent received TTD benefits from Petitioner, and that Respondent did not have Petitioner's consent to do so as required by § 39-71-701, MCA. Respondent denies that he received a "wage" from his business because he asserts that the business is not profitable and does not generate an income.

Held: Respondent received a wage from his business because he used business assets for personal use and wrote checks from his business account to pay personal loans. The fact that the business is not profitable according to Respondent's income tax returns has no bearing on whether Respondent himself received a "wage" from the business as that term is defined in § 39-71-123, MCA. Therefore, Respondent was not entitled to the TTD benefits he received and must repay those benefits to Petitioner.

***Cardwell v. Uninsured Employers' Fund,* 2008 MTWCC 24** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Attorneys' Fees, Uninsured Employer's Fund.

Summary: Petitioner petitioned the Court for benefits as a result of this Court's determination that he suffered an occupational disease while employed by Terry Rackley. At trial, the UEF conceded that Petitioner was entitled to TTD benefits at a rate of $183.15 per week beginning September 20, 2004, up until at least the date of trial. Petitioner argued that the UEF utilized the incorrect method in calculating his wages because the UEF failed to show good cause why the four pay periods preceding Petitioner's occupational disease were not an adequate representation of Petitioner's average weekly wage. The UEF argued that the preceding year more adequately represented the fluctuation in Petitioner's pay and periods of time that he spent being idle. Additionally, Petitioner requested costs and attorney fees.

Held: Petitioner is entitled to TTD benefits at a rate of $183.15 per week. The UEF demonstrated good cause for utilizing one year's worth of wages to determine Petitioner's average weekly wage. Because Petitioner did not prevail on the issue before the Court, he is not entitled to costs or attorney fees.

***Kramer v. Montana Contractor Comp. Fund,* 2008 MTWCC 48** (Findings of Fact, Conclusions of Law and Judgment).

Related Topics: Benefits, Penalties.

Summary: Petitioner suffered an industrial injury to his left shoulder, which was ultimately diagnosed as a rotator cuff tear. Although Respondent initially refused to pay indemnity benefits and for surgical repair of the shoulder, it did so after obtaining a second medical opinion which supported the treating physician's diagnosis. Petitioner maintains that Respondent was unreasonable in its initial denial of indemnity and medical benefits and that it further has incorrectly calculated the rate for Petitioner's temporary total disability benefits.

Held: Since the evidence demonstrates that Petitioner's job is not seasonal, his average weekly wage should be calculated using the statutorily-preferred method found in § 39-71-123(3)(a), MCA. Petitioner is entitled to his costs. Respondent's actions in adjusting the claims, while imperfect, were not so unreasonable as to entitle Petitioner to a penalty award or attorney fees.

APPENDIX A

APPEALS TO MONTANA SUPREME COURT, STATUS, AND DISPOSTION OF APPEALS

#	Case Name	WCC No.	WCC Decision and Date	SC Decision	Date
1	Fleming, Eldon	2005-1292	Order Denying the Filing of a Reply Brief and Reconsideration of Order Dismissing International Paper Co. - 12/20/05	REVERSED AND REMANDED	9/23/08
2	Gamble, Mary Ann	2005-1337	Findings of Fact, Conclusions of Law, and Order - 1/30/06	AFFIRMED	6/5/07
3	Pinnow, Gayle	2004-1190	Order On Cross-Motions for Summary Judgment (Judge Sherlock) - 2/24/06	REVERSED AND REMANDED	12/11/07
4	Hedrick, Channin	2004-1213	Findings of Fact, Conclusions of Law, and Order	DISMISSED by Stipulation of the parties	10/26/06
5	Peterson Mark	2005-1295	Findings of Fact, Conclusions of Law, and Judgment - 4/7/06	DISMISSED by Stipulation of the parties	7/26/06
6	Thompson, Lee N.; Sharp, Darin; Bailey, Scott	2004-1089	Order Granting Motions for Summary Judgment - 10/18/05 and Order Amending Order - 10/19/05 and Order Denying Intervenor's Motion for Recon - 4/28/06	Interim Order suspending mandatory mediation 6/7/06 REVERSED	8/17/07
7	Harrison, Jason	2004-1222	Findings of Fact, Conclusions of Law, and Judgment - 5/26/06	AFFIRMED	4/1/08
8	Kruzich, Henry	2005-1247	Findings of Fact, Conclusions of Law, and Judgment - 6/1/06	REVERSED 2008 MT 205	6/10/08

9	Kessel v. Liberty Northwest	2004-1189	Order Denying Motion for Summary Judgment; Order for Certification	AFFIRMED	11/27/07
10	Flynn, Robert/Miller, Carl	2000-0222	Order Determining Status of Final, Settled , Closed, and Inactive Claims	AFFIRMED IN PART; REVERSED IN PART - 2008 MT 394	11/25/08
11	Barnard v. Liberty Northwest Ins. Corp.	2005-1505	Findings of Fact, Conclusions of Law, and Judgment - 10/20/06	AFFIRMED 2008 MT 254	7/22/08
12	Satterlee, et al. v. Lumberman's Mut. Cas., et al.	2003-0840	Order Denying Petitioner's Motion to Allow Discovery and Granting Respondents' Cross-Motion for Partial Summary Judgment - 11/15/06	Appeal Dismissed without Prejudice Re Rule 54(b) Certification - 2007 MT 325	12/11/07
13	BeVan v. Liberty Northwest Ins. Corp.	2006-1665	Findings of Fact, Conclusions of Law, and Judgment - 12/6/06	AFFIRMED	12/21/07
14	Popenoe v. Liberty Northwest Ins. Corp.	2005-1490	Order Granting Petitioner's Motion for Summary Judgment - 12/1/06	DISMISSED with Prejudice by Stipulation of the parties	4/26/07
15	Harter v. Liberty Northwest	2006-1722	Findings of Fact, Conclusions of Law, and Judgment	DISMISSED	5/23/07
16	Hinman v. Montana State Fund	2006-1562	Findings of Fact, Conclusions of Law, and Judgment	AFFIRMED	10/30/07
17	Johnson v. Liberty Mutual Fire Ins. Co.	2004-1054	Findings of Fact, Conclusions of Law, and Judgment	DISMISSED with Prejudice by Stipulation of hte parties	5/14/07
18	Sturchio v. Wausau Underwriters Ins. Co.	2006-1583	Decision and Judgment - 1/30/07 Order Amending Decision and Judgment - 2/7/07	AFFIRMED	12/04/07
19	Michalak v. Liberty Northwest	2006-1641	Findings of Fact, Conclusions of Law, and Judgment - 3/22/07	AFFIRMED	1/3/08

20	Wilkes v. Montana State Fund	2006-1526	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment - 2/22/07	AFFIRMED	2/5/08
21	Johnson v. MHA Workers Comp. Trust	2006-1662	Findings of Fact, Conclusions of Law, and Judgment - 5/22/07	Appeal Dismissed 10/19/07 by Motion	
22	Evans v. Liberty Northwest Ins. Corp.	2006-1580	Findings of Fact, Conclusions of Law, and Judgment - 6/20/07 - 8/14/07 - Appeal Dismissed by WCC following successful mediation		
23	Oksendahl v. Liberty Northwest Ins. Corp.	2006-1679	Order Granting Petitioner's Motion for Summary Judgment - 6/21/07	AFFIRMED	4/22/08
24	VanBouchaute v. Montana State Fund	2006-1622	Findings of Fact, Conclusions of Law, and Judgment - 8/23/07	DISMISSED with Prejudice pursuant to Stipulation for Dismissal	12/12/07
25	Kratovil v. Liberty Northwest Ins. Corp.	2006-1551	Findings of Fact, Conclusions of Law, and Judgment - 7/17/07 and Order Denying Respondent's Motion for Reconsideration - 9/7/07	AFFIRMED - Remanded for further proceedings - 2008 MT 443	12/29/08
26	Lanes v. Montana State Fund	2006-1638	Findings of Fact, Conclusions of Law, and Judgment - 9/10/07	Interim Order No. DA 07-0651 AFFIRMED	9/6/08
27	Montana Municipal Ins. Authority v. Roche	2006-1587	Findings of Fact, Conclusions of Law, and Judgment - 11/14/07	AFFIRMED 2009 MT 205N	6/10/09
28	Aldrich v. Montana State Fund	2006-1536	Decision and Judgment	AFFIRMED 2009 MT 40	2/18/09
29	Siebken v. Liberty Northwest Ins. Co.	2007-1855	Decision and Judgment	AFFIRMED 2008 MT 353	10/21/08

30	Driggers v. Liberty Northwest Ins. Corp.	2006-1651	Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Motion for Summary Judgment	DISMISSED by Stipulation of Counsel	3/14/08
31	Sizemore v. Copper King Hotel and Convention Center	2007-2003	Order Granting Respondent's Motion to Dismiss	DISMISSED	6/17/08
32	Woodards v. MIGA	2006-1610	Order Granting Respondent's Motion for Summary Judgment, Denying Petitioner's Motion for Summary Judgment, and Granting Respondent's Cross-Motion for Summary Judgment	DISMISSED by Stipulation of Counsel	7/23/08
33	Dildine v. Liberty Northwest Ins. Corp.	2005-1389	Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment	AFFIRMED 2009 MT 87	3/24/09
34	Stavenjord v. Montana State Fund	2000-0207	Order Denying Respondent's Motion for Reconsideration - 4/24/08 and Order Regarding Identification and Notification of Potential Beneficiaries - 1/15/08	Remanded Pending Approval of Settlement Montana Supreme Court Order Dismissing Appeal with Prejudice	8/20/08 11/5/08
35	Fabbi v. Montana Insurance Guaranty Association	2006-1623	Findings of Fact, Conclusions of Law, and Judgment - 4/16/08	Montana Supreme Court Order Dismissing Appeal with Prejudice	11/26/08
36	Heth v. Montana State Fund	2006-1758	Findings of Fact, Conclusions of Law, and Judgment - 4/25/08	AFFIRMED 2009 MT 149	5/5/09
37	Narum v. Liberty Northwest Ins. Corp.	2007-1987	Findings of Fact, Conclusions of Law, and Judgment - 6/4/08	AFFIRMED 2009 MT 127	4/14/09

38	Reesor v. Montana State Fund	2002-0676	Order Adopting Order of Special Master - Findings and Conclusions by Special Master on Common Fund Issues	Remanded Pending Approval of Settlement Montana Supreme Court Order Dismissing Appeal with Prejudice	10/1/08 11/5/08
39	Satterlee, et al. V. Lumberman's Mutual Casualty Co., et al.	2003-0840	Order Denying Petitioner's Motion to Allow Discovery and Granting Respondent's Cross-Motion for Partial Summary Judgment and Order Granting Respondent Montana State Fund's Motion for Partial Summary Judgment		
40	Quick v. Montana State Fund	2006-1788	Findings of Fact, Conclusions of Law, and Judgment - 6/4/08	AFFIRMED	5/13/09
41	Russell v. Watkins & Shepard Trucking	2006-1531	Findings of Fact, Conclusions of Law, and Judgment - 7/11/08	AFFIRMED and Remanded for further proceedings - 2009 MT 217	6/24/09
42	Hanson v. Cedar Valley Construction & UEF	2007-1945	Findings of Fact, Conclusions of Law, and Judgment - 6/25/08	DISMISSED by Stipulation of counsel	9/17/08
43	Rau v. Montana State Fund	2006-1633	Findings of Fact, Conclusions of Law, and Judgment - 6/4/08	REMANDED for consideration of entry of judgment resulting from settlement; parties to move for dismissal of appeal within 45 days	
44	Hagemann v. Montana Contractor Compensation Fund	2007-1983	Findings of Fact, Conclusions of Law, and Judgment - 7/10/08	DISMISSED by Motion	9/26/08
45	Lasky v. State of Montana	2008-2078	Respondent's Motion to Dismiss	DISMISSED	9/26/08

46	Schmill v. Liberty Northwest & Montana State Fund	2001-0300	Findings and Conclusions of Special Master Denying Responding Insurers' Motion to Dismiss on "Gateway Legal Issues"		
47	Tinker v. Montana State Fund	2007-2018	Findings of Fact, Conclusions of Law, and Judgment	AFFIRMED 2009 MT 218	6/24/09
48	Briese v. MACO Workers' Compensation Trust & J. Briese	2007-1794	Order Denying Richard H. Renn's Motion to Award Attorney Fees	AFFIRMED 2009 MT 259N	8/4/09
49	Kilgore v. Transportation Ins. Co.	2008-2056	Findings of Fact, Conclusions of Law, and Judgment - 12/4/08	DISMISSED by Motion	3/13/09
50	Liberty NW Ins. Corp. V. Montana State Fund re; G. Mitchell	2007-1827	Findings of Fact, Conclusions of Law, and Judgment - 12/23/08		
51	Casiano v. Montana Contractor Compensation Fund	2008-2042	Order Granting Respondent Montana Contractor Compensation Fund's Motion for Summary Judgment - 3/10/09	DISMISSED with Prejudice	8/25/09
52	Skiff v. Montana State Fund	2008-2099	Findings of Fact, Conclusions of Law, and Judgment - 3/6/09	Appeal and Cross-Appeal DISMISSED with Prejudice by Stipulation of counsel	7/20/09
53	Distad v. Montana State Fund	2008-2076	Findings of Fact, Conclusions of Law, and Judgment - 3/20/09	DISMISSED with Prejudice	6/25/09
54	Boyd v. Zurich American Ins. Co.	2009-2279	Order Granting Respondent's Motion for Summary Judgment		

STATUS AND DISPOSITION OF WCC CASES APPEALED TO THE MONTANA SUPREME COURT

Affirmed:	**22**
Reversed:	**4**
Affirmed in Part – Reversed in Part:	**1**
Dismissed:	**20**
Pending:	**5**
Others:	**2**

APPENDIX B

VETO LETTER RE: SENATE BILL 371

OFFICE OF THE GOVERNOR
STATE OF MONTANA

BRIAN SCHWEITZER
GOVERNOR

JOHN BOHLINGER
LT. GOVERNOR

May 5, 2009

The Honorable Linda McCulloch
Secretary of State
State Capitol
Helena, MT 59620

Dear Secretary McCulloch:

In accordance with the power vested in me as Governor by the Constitution and the laws of the State of Montana, I hereby veto Senate Bill 371, "**AN ACT REVISING THE DEFINITION OF "EMPLOYEE" OR "WORKER" WITH RESPECT TO WORKERS' COMPENSATION LAWS; CLARIFYING INJURIES THAT MAY NOT BE CONSIDERED AS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT; AMENDING SECTIONS 39-71-118 AND 39-71-407, MCA; AND PROVIDING AN EFFECTIVE DATE.**"

Senate Bill 371 establishes a statutory definition for certain injuries that do not arise out of and in the course and scope of employment for purposes of workers' compensation coverage. The definition focuses on injuries that have occurred during breaks and employment-related social events. Presently, in Montana, the determination of whether an employee's injury arises out of and in the course and scope of employment is not codified but is determined based on a four-part test that is derived from well-established common law principles in the area of workers' compensation law. Under the four-part test, coverage is determined based on whether the activity was undertaken at the employer's request, whether the employer compelled the employee's attendance at the activity, whether the employer controlled or participated in the activity, and whether the employer and employee mutually benefitted from the activity. *See, e.g., Courser v. Darby School Dist.*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984). The Montana Supreme Court has repeatedly affirmed that no one factor is determinative in the analysis. Rather, the determination of whether an injury arose during the course and scope of the employment must be based on the "totality of the circumstances."

To my understanding, Senate Bill 371 was introduced primarily in response to two decisions by the Montana Supreme Court, involving unusual fact patterns, that were objected to by workers' compensation insurers. Based on the opinion of representatives I consulted from the Montana Department of Labor and Industry, I proposed an amendatory veto of the bill to affirm that the bill was consistent with generally recognized principles in workers' compensation law. The Legislature rejected my amendments, thereby raising questions as to the bill's intent and effect. In fact, I have heard varying and diverse opinions expressed as to whether the outcome of the two decisions objected to by the insurers would be altered by passage of the legislation.

With the above history in mind, I have vetoed this bill because I do not believe it would be helpful – for either workers or employers – to reverse well-settled law and legal principles in Montana regarding workers' compensation coverage. For workers, a change in the law would create uncertainty, possible denial of coverage, and unnecessary litigation until the new definitions were interpreted by the courts. For employers, too, a change in the law would result in uncertainty. Additionally, absent workers' compensation coverage, employers would face the possible greater liability exposure under tort theories of recovery. From the discussions among legislators, alone, one thing is clear: there is not unanimity of opinion as to the effects of this legislation.

Last summer, the Labor-Management Advisory Council on Workers' Compensation within the Department of Labor and Industry, chaired by Lieutenant Governor John Bohlinger, considered the advisability of legislation to address the matters covered by Senate Bill 371. The Advisory Council, containing equal representation from labor and management, did not reach agreement on legislation. In fact, the Advisory Council's conclusions reflected the same concerns with the legislation as those I expressed above, namely that coverage issues are fact-specific, Montana's case law is consistent with the case law from other states, and the effect of the court decisions and legislation – in terms of costs and impacts to workers – were unknown. The recommendations of this Advisory Council are persuasive in my decision to veto the bill, as well.

Finally, I mention that the Legislature passed Senate Joint Resolution 30, requesting an interim study to examine, among other things, the premium cost drivers to workers' compensation insurance in Montana, as compared to other Western states with similar industries. Assuming this issue will be studied by the Legislature, my administration looks forward to working with the interim committee to continue to look at not only the narrow issues raised in this bill but, more importantly, the larger picture as to how workers' compensation costs can be kept down in Montana.

For the reasons expressed above, I ask for your support to sustain my veto of Senate Bill 371.

Sincerely,

BRIAN SCHWEITZER
GOVERNOR

cc: Legislative Services Division